THE HIGH COURT

[2014 No. 9141 P.]

BETWEEN

JOSEPH KEARNEY

PLAINTIFF

AND

TIPPERARY COUNTY COUNCIL

AND

ROADSTONE WOOD LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 12th day of April, 2019

Introduction

1. The plaintiff is aged 47 years and was born on 21st September, 1972 and lives in Portlaw, Co. Waterford. The plaintiff pleaded that he was a road user and pedal cyclist within the meaning of the Road Traffic Act 1961, as amended and the Roads Act, 1993 as amended.

2. The first defendant is sued as a local and public authority by virtue of the Roads Act, 1993 as amended, with registered office in the County of Tipperary and was at all material times responsible for the maintenance, repair and upkeep of the public road at the locus of this accident at Ballinaraha, Kilsheelan, Clonmel, Co. Tipperary.

3. The second defendant is a private company limited by shares carrying on amongst other businesses, that of road construction, maintenance and repair, with registered offices at Tallaght Dublin 24.

The Plaintiff's Evidence

4. The plaintiff confirmed his age as set out above and place of residence. He explained to the court that there is a big tradition of cycling in his area and that he was a member of the Carrick Wheelers Cycling Club for three years prior to this accident. The plaintiff explained that he had worked all his life firstly in the motor trade working in a garage and later for many years he worked with Bosch & Long but he accepted a redundancy from that company and he went back to work where he had initially worked with a Mr. George Corbett where he remained until he was laid off just before Christmas 2010. His work there involved preparing cars for sale. He was laid off because of quiet time in the business and he had hoped to go back to that employment when matters improved.

5. The plaintiff described a pattern of a Sunday morning cycle in winter over 100km in length as a regular feature and in summer longer trips of 140km were undertaken by this group of skilled cyclists. He attended at the Tour de France prior to this accident.

6. The plaintiff indicated that on the date of this accident the 26th of December a good number of people 16 or 17 in all were cycling two abreast on the hard-shoulder and he noted the width of the black on the road in front of him with a higher lump in the centre. It was about 9.30am in the morning and the Carrick Wheelers were cycling along the public highway at the Ballinaraha, Kilsheelin, Clonmel, Co. Tipperary and he was wearing a helmet. As he approached a curve in the road, suddenly and without warning he was caused to slip and fall from his bicycle and he brings this case claiming that a hazard was created by the use of excessive sealant on the road surface. This witness said that cyclists cycle two abreast as far as possible avoiding cat's eyes on a route much used by the Carrick Wheelers Cycling club of which he was a member.

7. While the road was damp there was no rain and they were cycling quite close two abreast to the yellow line. A Mr. Leslie O'Donnell was on his inside and after the fall the plaintiff had to crawl into the ditch having shouted to his colleagues to warn them of the danger. Initially he thought he was only winded. Mr. Maurice Harty stayed with him and the plaintiff remained on his knees as he was not able to stand up. His wife was contacted and within 15-20 minutes she arrived at the scene and he was assisted with difficulty into the vehicle by herself and Mr. Harty. When he arrived at Waterford Regional Hospital he was unable to get out of the motor vehicle without a spinal board which was brought to the scene and he had excruciating pain. He was told that his back was broken and he was given a brace to sleep on a stiff brace which he had to wear for a three month period. The plaintiff suffered indescribable pain and once every couple of weeks he was transferred to the Mater Hospital as a day patient so that they could investigate and see whether the bone was healing or not. He suffered compression fracture to the T8 vertebrae. The plaintiff was very disabled and in constant pain and he suffered weakness and loss of body mass and muscle. He was treated with very strong pain killers including Tramadol and Diclac and the medication he received continued into the second year of his treatment when he managed to get off these medications.

8. The plaintiff described being very disabled indeed for a 6-month period and being weaker for a long time after that. He accepts that 10 months later he was able to get back on a bicycle but was nervous and two years after the accident while he was back cycling, he remained nervous on a bicycle. It is only in the last two years that he began to feel strong again.

9. One and a half years post-accident, the plaintiff began applying for jobs in Clonmel, seeking van driving and such work but obtained no employment. The plaintiff's belief is that but for this accident he would have been back working in the garage where he had previously worked.

10. The plaintiff has difficulty doing heavy work and would describe lifting heavy shopping as something which would aggravate back pain. He describes having pain once a week approximately and that painkillers are effective in that regard. The plaintiff expressed the view that there was excessive sealant on the road surface, and that the cyclists cycled two abreast as far as possible, avoiding cat's eyes on a route much used by the Carrick Wheelers. The plaintiff believed that this use of excessive sealant on the surface created a hazard which caused him to slip and fall from his bicycle.

11. Under cross-examination the plaintiff confirmed that in a previous year he had applied for a variety of positions including a job packaging and that he agreed that he had spent some time at home looking after the children and that his wife was working but that he was anxious to get back to work and was disheartened. The plaintiff fully accepted that he would have returned to work earlier

than two years post-accident if he could have obtained employment. The plaintiff didn't agree that he fell on a downhill stretch and he said that it was uphill that the bike went straight from under him. The plaintiff didn't accept that it was a case of one wheel going from under him he said it was the two wheels. He didn't accept Mr. Connelly's report which stated that it was the front wheel. He said it was eight years since the accident.

12. This witness said that it was a sweeping kind of bend on the whole turn but that the bend itself was off in the distance from where the accident occurred. He agreed that he was a marathon runner and that he rode with the bike club and that he was involved in racing and he said that the races they did were usually 100-140km in length and that he had a new bicycle at the time with the width of the wheel at 23mm.

13. He was asked about track cycling and he said that was a different discipline and that it wasn't something he had ever done. In this cycle he said there were people ahead of him and behind and he was familiar with the road because it was a road they used every Sunday and that thousands of cyclists go up and down it. The plaintiff argued that the black stuff on the road was lethal and that he himself was obeying all the rules of cycling.

Evidence of Mr. Leonard Foley
14. This witness gave evidence that he was directly behind the plaintiff and he considered the plaintiff to be a safe rider. He described avoiding both the yellow line and avoiding cat's eyes and he said that the plaintiff's bike went out to the plaintiff's right-hand side and as the plaintiff shouted his warning and as his bicycle was swept underneath him, Mr. Foley himself veered to the left to avoid the plaintiff.

Evidence of Mr. Maurice Artry
15. Mr. Artry verified the plaintiff's account in that he was close to the yellow line and he said that the plaintiff's wife came 15-20 minutes later. This Court notes the evidence of this witness that he had witnessed yet another accident on the other side of the same roadway and he could see in that case that the issue was sealant in relation to that accident as well as in relation to this particular accident.

Evidence of Mr. Jack O'Reilly, Engineer called on behalf of the plaintiff.
16. Mr. O'Reilly carried out an inspection on the 11th of January, 2012. His view was that the area of the road in question showed rectification as a result of partial failure of road surfacing and the failure was due to the loss of chippings and the road won't have slip resistance for ordinary traffic without the chippings. He described this as fairly significant remediation on the Clonmel bound lane within a half mile. This witness indicated that there had been a replacement of the asphalt course which was 11'x 50' and there was over banding with bitumen sealant. He described six inches of over banding and in his opinion this is not permitted on a national primary road which this was and he indicated that the patching ought to be side to side but that the patching here was the type of patching which would only be allowed on lesser roads. By law it shall not exceed one inch and it must be gritted to ensure grip. This witness gave his opinion that the day was damp on the day of this accident which decreases which was already very limited slip resistant, this was a factor. He noted that the patch was significantly wider by the then prevailing standards and as a second contributory factor for this accident he noted the absence of grit in the mix. This witness referred to the Department of Environment Guidelines of 2002 as being precisely relevant to this case. He also said that there was no necessity for the width of sealant band evident at the locus.

17. This witness referred to the Guidelines for the opening, back filling and reinstatement of trenches in public roads, April, 2002 from the then Department of the Environment and Local Government and at note 4 he indicated that

> "joints sealed with hot bitumen and topped with fine sand/grit to get a minimum 55 skid resistance value as determined by the portable skid-resistance pendulum used in accordance with Road Note 27 and shall not exceed 3mm thickness and 25mm width".

In relation to permanent and immediate permanent reinstatement of roadways with bitchumus wearing courses on lean mix or DBM road basis. This witness also referred to guidelines for managing openings in public roads in edition September 2015 from the Department of Transport, Tourism and Sport and referred to Note 7 in particular –

> "joints sealed with hot bitumen and topped with fine sand/grit to get a minimum 55 skid resistance value as determined by the portable skid resistance pendulum used in accordance with Road Note 27 and shall not exceed 3mm depths and 50mm width or other method approved by the Road Authority".

18. By way of comparison this witness also referred to the Department of Transport New Roads and Street Works Act, 1991 Code of Practice approved by the Secretaries of State for Transport, Wales and Scotland under ss.71 and 130 of that Act for the specification for the reinstatement of openings in highways. He referred to para. 3 "edge sealing" there should be no significant spillage, splashing or any deliberate overpainting of the adjacent road surface, subject to the requirements of s.6.5(6) and para. 6 concerning over banding, by way of comparison and he quotes from same –

> "any over banding or quoting of the road surface, at the interface between the existing road and the reinstatement edge, shall not exceed 3mm thickness nor 40mm width. The minimum skid resistance value of the material shall be 55SRV as determined by the TRRL portable skid resistance tester used in accordance with Road Note 27… 1969".

This witness noted that the width of the bitumen sealing strip at the locus was 150mm at its maximum when it should have been no greater than 40mm and he also noted that the bitumen sealing strip at the edge of the wearing course repair in the recently paved roadway was excessively wide and he said in respect of laying down the sealing strip, improper workmanship arose on the part of both defendants.

19. With reference to a number of photographs, photograph 2 looking from the left to the right he noted over banding on the width which started nearest the camera at two and a half feet and there was six inches broken yellow line and six inches of over banding which simply was not permitted on a national primary route that the reinstatement ought to be "side to side". He stressed with reference to sketch documentation that it should not exceed one inch and that the banding had to be gritted to ensure grip.

20. This witness stressed that the particular route the N24 was frequently used by cyclists and it was well known that they tended to cycle close to the hard shoulder and that therefore on the issue of foreseeability it was reasonably foreseeable that they would be there and that care ought to have been applied to ensure that the sealant was not applied to an excessive width particularly where the surface slopped laterally by 54mm per metre. His main point was that the remedial works carried out by Roadstone do not conform with the NRA's specifications. This witness in referring to the 2002 and 2015 Department of Environment documents expressed the

opinion that they do clearly allow for the use of bitumen sealer on surface wearing course joints but that the widths should not exceed those specified and that both of the dimensions specified were significantly less that the widths he observed at the locus and he said that these department documents require the use of fine grit or sand to achieve satisfactory skid resistance which was not evident on the joint sealing bitumen at the locus. He confirmed that the N24 is a national roadway.

21. This witness clarified that if a road is cut for service being a non-national road that 25mm was the maximum allowed in terms of width until quite recently when that was increased. That is where a service is installed on a non-national route and he confirmed that the N24 is a national road.

Evidence of Mr. Crotty, Engineer then working with the Tipperary County Council
22. This witness explained that he no longer works for the defendant County Council but was the County Engineer at that time and that Roadstone were the foremost company in the country for this type of work. His opinion was that he assumed that they were fit to do this job and he pointed out that the material had to be laid within a certain temperature range, between 140 degrees and 150 degrees and he said for that reason one had insulated or covered trucks, compacted at high temperatures to give a similar result to concrete. This witness said it was most important that when laying a road, that the weather was not too cold and he said that he was area engineer at the time and that he should not have had to tell Roadstone that and that he was entitled to say stop, that Roadstone risked failure if they laid the road when the temperature was not correct and he said that when the road was originally being laid in 2010, the weather was extremely cold. He pointed out that at the end of October, 2010 until March, 2011, the remedial works were carried out and were finished by April 2011, because a number of parts had started to unravel and had to be repaired. In his opinion the Council were paying out just under one million for this work and they had to do a detailed assessment before paying for the work. In that regard he noted that the loss of chippings on the original job had occurred pretty quickly and it was evident at the handover point regarding this particular site. Regarding the remedial works, he said the final balance was due and was paid in June 2011.

23. He referred to both the 2002 and 2015 Department of Environment specifications and the allowed over bound strip was increased to 50mm in 2015 and he confirmed that one cannot get slip resistance without grip and he said that there was a two inch sloping away for drainage at the locus.

24. This witness confirmed that the National Roads Authority was established under the 1993 Roads Act and they were charged with the maintenance and construction of National and Primary and National Secondary Roads and Motorways and that did not include country roads. Mr. Crotty had raised the issue of temperature at the time when this work was first carried out, with the second named defendants and at the time the weather was between four and five degrees but Roadstone had indicated a desire to continue on the basis that six degrees is usually sufficient to allow them continue but his evidence was to the effect that he had warned Roadstone that if this original work was substandard they would have to reinstate it and he said that on 29th November 2010 they were obliged to stop work for a two week period because of the weather, and then they recommenced and kept going until Christmas 2010 recommencing after Christmas on the 14th/15th of January 2011 but it was then left unfinished for two months and only completed at the end of March, 2011 and he said that a number of parts started to unravel and that portions were repaired. Very importantly this witness said that the chips started to breakaway in March 2011 and that hadn't been noted prior to Christmas and he said that they then agreed with Roadstone on site what exactly would be done and they mutually agreed the marking of the areas on site to be repaired. This witness agreed that the first named defendant then examined the works when the job was done and that there was an insurance and an indemnity during the course of that contract between the parties.

25. Concerning the remedial works, they were finally finished and paid for in June 2011. This witness agreed that an amount of bitumen allowed on the over bound strip was increased to 50mm in the 2015 Department of Environment document referred to. He also agreed that one cannot get slip resistance without grip and that the widths are key.

26. Mr. Crotty, gave evidence as to the tender document specification and conditions of contract to supply, lay and roll bituminous macadam on roads in South Tipperary 1st February, 2010 to 31st December, 2010. Paragraph 5 of this document designates specification:

1. Material should be manufactured and laid in accordance with NRA specification for roadworks;

2. The bituminous macadam shall be laid at gradients provided by the County Council;

3. The contractor shall ensure when transporting the bituminous macadam that lorries are adequately covered so as to ensure that the temperature is maintained within the limits laid down in the NRA specification for roadworks.

27. Paragraph 11(2) dealt with adverse weather conditions and set out that the Contractor shall take whatever precautions are necessary to protect materials and finished work from the harmful effects of weather. Paragraph 3 sets out that weather conditions shall not be accepted as an excuse for inferior quality of materials or workmanship.

28. The NRA specification for roadworks are specifications which the County Council demands strict adherence to in terms of all details of the specifications and the contractor is to note and be aware of same.

29. Paragraph 15 of the conditions of contract set out all of the details of the insurers. This witness gave evidence that it was understood that Tipperary County Council were indemnified in respect of any works and the result of any such works and that they had received a copy of the second defendant's policy of insurance outlining the terms of same. This witness accepted that the insurance was one which covered matters which arose during the course of the contract between the parties and he said that he wasn't an insurance expert as to the timeline of that insurance as to whether that ended when the road was taken in charge by the local authority. This witness agreed that the works did not comply with the NRA specification and said that it wasn't stated in the document that you don't put sealant down when asked about the sealant not having a width of more than 25mm but he agreed that the width is greater than that which was required and that dampness did effect the position and this witness agreed that the certificate was not signed even though there was substantial completion of the work.

Evidence of Mr. Mark Barrett
30. Mr. Mark Barrett contracts manager for the second defendant agreed that the final payment was May-June, 2011 and that they had agreed that works had to be done including re-surfacing and sealing the joint at the top. He said they were not asked to return after this work of repair was complete and that everyone was happy and that there was no complaint. This witness said that their insurance cover covered them while they were doing the work and when the work was done and they were paid they handed the road back to the local authority. He stressed the words in the policy which limited the insurance cover in his view to "during the period of the contract work". This witness said that once the council engineer was happy and signed off and paid them that that was their

involvement in the job which was then finished. This witness did accept that the area covered by the bitumen was too wide and that the cover was not embedded with any slip resistant chips and he agrees that the road then had no slip resistant at that point.

31. Under cross-examination in respect of the NRA specifications and regarding the agreed term in the contract, he said that they did not comply and he said that they were in breach of the terms of their contract with the local authority and he had heard that the injury was directly related to that. This witness said that the weather in late November, 2010 was six degrees and that it was one degree higher than a danger zone for doing such works in terms of successful working. This witness agreed that his company were the professed experts in this field and he also agreed that the local authority engineer was entitled to rely on that expertise and that the view of the local authority engineer was disregarded in November, 2010 regarding the temperature and he said that in his view the specifications plus one degree of heat applied and they paid for the repairs that it had to be repaired and re-sectioned and when it was put this witness that the second set of repairs works did not live up to the specifications in the contract, he pointed out that the local authority had signed off and that once a client was happy that was it. He also said that there was no necessity for a certificate of completion and he inferred that matters were resolved when the last invoice resulted in a last payment.

Evidence of Mr. Frank Walsh
32. This witness was called as an Educational Adviser Assessor to give evidence on behalf of the plaintiff as to the effect of the injuries on his employment possibilities and the evidence was that the plaintiff had been unable to obtain similar employment to that of which he had before. The fact of the redundancy was not challenged when the plaintiff gave evidence in relation to his accepting a redundancy from Bosch and Long. This witness explained that the plaintiff would not be in a position to do heavy work and outlined his efforts to obtain employment which had been unsuccessful but he accepted under cross-examination that the plaintiff had minded his children during his period of recovery when his wife was working.

Submissions
33. Counsel for the second named defendant made the submission that the issue was whether there was causative negligence in the case and he said that if the repair job sealant was wider than the plaintiff's bike wheel and that he may have fallen anyway and that the plaintiff had to prove causative negligence. The first named defendant said that the second named defendant had brought insurance to the job which lasted for the duration of the works concerned and that the road engineers from the local authority had agreed with the second named defendants as to what was to be done and that the second defendants were the experts who were paid their money at the end of the job.

34. The evidence on behalf of the plaintiff is that insofar as they both accept there was faulty work and that the second named defendants must have been aware of the risk given that they have great expertise and given the evidence of the cyclist who was behind the plaintiff who said that he was swished out underneath and that this wasn't the only such event as the third witness for the plaintiff had witnessed a similar event and therefore it was reasonable foreseeable and there was a duty to ensure that the work was done properly.

35. The medical prognosis for this plaintiff is very positive and he is back to most of his day to day activities with some occasional back pain and discomfort with manual tasks which involve lifting but he can do the majority of his tasks without any major restrictions and he takes over the counter medication as required, has some pain after long car journeys. Reports from his general practitioner Dr. Gerry O'Sullivan and from Mr. Paul Connolly Consultant Orthopaedic Surgeon were handed in. The amount of special damage in the case was agreed at €2,153.85. These reports note that heavy lifting does cause a difficulty but that the plaintiff can do most day to day activities and is taking occasional pain medication. He has a good prognosis and has made a good recovery. From a medical point of view, the plaintiff has been told to consider looking for alternative employment something less strenuous than what he might have done before.

Findings of fact
36. The plaintiff gave his evidence carefully and honestly. He did not exaggerate his situation.

37. He could have gone back to work two years after the accident if he had been able to find employment appropriate to his position. I accept the evidence to the effect that he does have difficulty if he tries to do heavy manual work and that lifting heavy bags of shopping does affect him.

38. The witnesses who gave evidence on behalf of the plaintiff did not exaggerate the situation and honestly explained the situation as they saw it. They gave credible and cogent evidence to the court as did he. As to the cause of this accident it is quite clear and there is no real dispute as between the two engineers on the point, that the bitumen sealant was not in accordance with the NRA specifications as described herein. It was the duty of both the local authority and Roadstone to ensure that the contract was fulfilled in line with the specifications as set out in the contract. Both agreed the extent of the remedial works to be carried out Roadstone though the evidence of Mr. Mark Barrett, their contracts engineer, took the view that their insurance cover covered them while they were doing the work and that when the work was completed by way of repair that everyone was happy and that there was no complaint and that they were paid and they handed the road back into the care of the local authority. He said the county engineer was happy and signed off and paid them and that their involvement with the matter was then at an end. He did accept however that the area covered by the bitumen was too wide and he did accept that they were the experts who were paid their money at the end of the job.

39. It seems to this court that both the first and second defendant accept evidence put forward on behalf of the plaintiff that there was faulty workmanship in terms of the original work and later the repair. A similar incident had occurred elsewhere on that road and had been witnessed by one of the witnesses who gave evidence in this case. In the view of this court, while Roadstone carried out these remedial works and did so without ensuring that the work was done to the correct standard in line with the correct specifications, and they were clearly in breach of the regulations as set out herein they put in material more appropriately used in what was described as a sandwiched type system, much wider than it ought to have been put in as a patching and they ought to have been fully aware of the required specification because this is an area in which they profess expertise.

40. The County Council were also negligent because they also could not but have reasonably foreseen that such patching, negligently done in breach of the regulations, would cause an accident and they were well aware that there had been a similar accident and that the plaintiff was an experienced cyclist in a party of experienced cyclists who used that route very often. It is clear that the plaintiff suffered severe pain and a loss of the amenities of life to a significant degree for nine months in extreme pain and for a minimum period of two years thereafter a fairly significant pain and suffering. The plaintiff continues to suffer some pain from time to time and is somewhat limited as to the type of work he can undertake.

41. This court finds that there was causative negligence, that the defendants are jointly and severally liable for the damage suffered by the plaintiff.

42. In all the circumstances the appropriate award for pain and suffering to date and general damages is €62,000 with items of special damages agreed in the sum of €2,153.85 giving a total of €64,153.85.