Neutral Citation: [2015] IEHC 35

THE HIGH COURT

[2009 No. 3482 P]

BETWEEN

TINA ALTMAN

PLAINTIFF

AND

BLACKROCK CLINIC LIMITED

DEFENDANT

JUDGEMENT of Mr. Justice Bernard J. Barton delivered the 20th day of January, 2015.

1. The plaintiff was born on the 4th day of December, 1954. She brings these proceedings against the defendant for damages for personal injuries and loss arising as a result of an accident which occurred on the 29th day of June, 2006 in the defendant's premises known as the Blackrock Clinic, County Dublin. The plaintiff, who was a pedestrian, claimed that she fell as she was preceding from the access road to and from the clinic onto a pedestrian walkway and which was located adjacent to the entrance to the clinic car parks.

2. The plaintiff alleged in her pleadings that she was caused to trip and fall on a step and/or an incline and/or a ramp and which she alleged constituted a hazard for pedestrians including herself. A full defence was delivered to the plaintiff's claim thereby putting liability between the parties in issue. The defence also incorporated a plea that the plaintiff was guilty of contributory negligence the essence of which was that the plaintiff was the author of her own misfortune.

3. During the course of the opening of the case it became apparent that the plaintiff, who represented herself, her former solicitors having come off record, was not in a position to call some of the medical witnesses who had treated or who had advised her and that she wanted to update her particulars of personal injury and loss. In this regard the court acceded to her application to adjourn the trial of the action insofar as it related to the question of quantum but directed, on an application by the defendant under O.36 of the Rules of the Superior Courts, that all matters of fact relating to the issue of liability be tried separately, both parties then being in a position to proceed with that aspect of the case.

4. The evidence of the plaintiff was that she drove into the Blackrock Clinic for the purposes of collecting her mother who was in a wheelchair and waiting for the plaintiff at the hospital reception. The plaintiff was driving a black BMW motorcar and was unaccompanied. On reaching the car park barrier she noticed a car parking space to her right which was located on the public road side of the barriers and which was one of several parking spaces reserved for consultants and members of staff.

5. In the course of her evidence the plaintiff indicated that she was happy to be able to park in the vacant space as it meant that she did not have to pay for parking and saved her the inconvenience of searching for one in the clinic's car parks. Accordingly, she reversed into the vacant staff car parking place, got out of her car, and started to cross the access road. As she did so she realised that she had left her mobile phone in the car to which she returned: having retrieved her phone she recommenced crossing over the access road to a pedestrian walkway which was located on the side of the road opposite the staff car parking facilities.

6. The plaintiff was very familiar with the clinic and had attended there on a number of occasions before the date of the accident. She described the grounds in some detail including the pedestrian walkway the presence of which she was aware.

7. It was the plaintiff's evidence that she had driven into the clinic shortly after 4pm and that as she was re-crossing the road she was holding a handbag and her mobile phone.

8. It was her evidence that as she approached the walkway one of her feet caught off something which she believed to be the kerb of the walkway itself and as a consequence of which she fell forward and landed on the walkway pavement. Her feet, however, ended up just over the road surface. She recalled her phone and her bag flying out of her hand as she fell and that whilst on the ground she was able to retrieve her handbag but not her phone. She thought she had been unconscious for a short period of time and recalled that a member of staff, who transpired to be a Mr. Noonan, arrived to render assistance. The plaintiff was still lying on the ground at that stage; she could not get up and had difficulty feeling her feet.

9. According to her evidence the surface of the road was black in colour as was the surface of the walkway and which she described as being filthy dirty. She described works going on at the entrance to the clinic but was not sure who was responsible for these works. I took this to be an indication by the plaintiff that she thought that these were in some way connected with the clinic and possibly explained the condition of the walkway as described by her. She also gave evidence that as a result of the presence of large trees which were in full foliage and which were in the vicinity of the walkway and the staff car parking area that the scene of the accident was very dark; moreover she gave evidence that there were a lot of bushes in the beds of the walkway which protruded out as far as the road as well as encroaching onto the walkway itself.

10. It was clear from the photographic evidence given by the defendant's facility manager Mr. McGowan and by the engineers called on behalf of both parties that the pedestrian walkway was made up of red pavers or bricks. It was the plaintiff's evidence, however, that at the time of her accident the colour of the bricks or pavers could not be seen because they were nearly black in colour due to the presence of filth and dirt which had collected on the walkway surface.

11. As to the mechanism of the fall the plaintiff said that neither of her feet had mounted the walkway surface at the moment when she tripped. She was certain that one of her feet had caught on something and as to what she believed that to be the kerb.

12. Three weeks after the accident the plaintiff went back to the clinic and noticed that the trees had been cut back as had the bushes, moreover, she noticed that a yellow paint, which she described as being unusual and very noticeable, had been painted on the kerb where the accident had occurred.

13. It transpired in the course of the hearing that there was no issue between the parties as to the fact that the kerb was painted with a yellow paint after the date of the accident and that that had been carried out by the defendant's grounds man. It followed that at the time and date of the accident the kerb of the walkway where the accident had occurred had not been highlighted by painting.

14. With regard to the painting of the kerb, the defendant's facility manager, Mr. McGowan, gave evidence that the defendant's architects had given certain safety advice after familiarising themselves with the premises preparatory to designing a multi-storey car park and additions to the hospital. They first arrived on site in 2005. They had advised, amongst other things, that a number of steps located at various parts of the premises ought to be highlighted by being painted in different colours and that the purpose of that was to assist the visually impaired. It was his evidence that the step in question was not included in the advice given by the architects and that the step had not been painted either directly as a result of that advice nor as a result of any instruction of the management including his own but rather had been included in the painting of the other steps by the defendant's Lithuanian grounds man on his own initiative. The painting of the step had nothing whatsoever to do with the accident.

15. Returning to the evidence of the plaintiff, she said that having had a back operation in the past she was a particularly careful person and that on the day of the accident she was wearing what she described as sensible, flat and comfortable shoes. With regard to the lighting and weather conditions prevailing at the time of the accident the plaintiff said that the tall trees were blocking the light and although the weather was fine one would think that it was, as she put it, black dark. In passing I note that poor lighting as cause or contributory cause to the accident was not pleaded or particularised by or on behalf of the plaintiff when she was legally represented or otherwise. The defendant did not, however, take any objection to this evidence at the trial presumably because the plaintiff was then a lay litigant and because the defendant was, in any event, in a position to deal with such evidence.

16. In the course of cross examination it was put to the plaintiff that she had crossed the road at a pedestrian crossing a suggestion which she rejected, it being her recollection and belief that there was no pedestrian crossing there at the time.

17. Photographs were then put to the plaintiff which, it was suggested, showed a black BMW car in a staff car parking place and said to be the property of the plaintiff. Her initial response was that she could not confirm that it was her car because she could not make out the registration number but, subsequently, having reviewed CCTV footage taken at the time of the accident, she agreed that it was her car.

18. It was also put to the plaintiff that the series of photographs which had been taken later in the afternoon of the day of the accident by the defendant's facilities manager, Mr. McGowan, showed an altogether different scene to that which she had described in her evidence. Her initial response to the photographs was that they were not accurate; she said they did not show the scene as it was at the time of her accident and she questioned whether they had been taken on the same day.

19. It was put to the plaintiff that the photographs showed the presence of a pedestrian crossing and that both the road surface and the cobble lock pavers, which could clearly be seen to be red in colour, at the time when the photographs were taken, were in good condition. The plaintiff accepted that this was so.

20. It was also put to the plaintiff that the photographs showed that the bushes which were in the walkway bed were not, as she had suggested, over growing either the walkway nor the road and, again, she accepted that this was what the photographs did indeed show, however, she insisted that at the time of her accident the scene was as described by her in evidence and not as portrayed in the photographs.

21. When invited to comment on the scene of the accident as portrayed in the photographs the plaintiff agreed that one would, indeed, be very unfortunate to have an accident in the scenario as evidenced by the photographs: in fact her own assessment of the scene as portrayed was that such would be, in her own words, a freak accident.

22. The plaintiff also agreed that in the scene as portrayed in the photographs the walkway was clearly visible and that on crossing the road it would have be obvious to any pedestrian that one was approaching a walkway, however, the plaintiff again repeated in her evidence that the photographs did not fairly reflect the condition of the cobble lock pavers nor the scene in general as it was at the time of her accident. Moreover, she felt that the kerb ought not to have been present. In her view there should have been a slope up to the footpath from the road surface and not a kerb. She did not think that the layout was a good design.

23. A version of the cause of the accident contained in para. 2 of the replies to particulars was put to the plaintiff. According to this, it was the uneven cobble lock pavers or bricks which had caused her accident. She rejected this account and insisted that she had tripped as a result of one of her feet hitting the kerb.

24. On the 24th of May 2011 the plaintiff attended a joint engineering inspection at the clinic and identified the *locus in quo*.

25. According to an account of the accident contained in the report of Mr. Cathal Maguire, consulting engineer retained on behalf of the defendant, he was advised at the scene that, having crossed the pedestrian crossing, the accident had occurred at the footpath on the far side of the road from where she had parked her car. According to this account the plaintiff stepped up onto the footpath and then fell describing how her trailing foot caught behind her so that she tripped and fell onto the footpath.

26. The plaintiff said that the defendant's engineer had misunderstood the description of the accident mechanism and that as far as she was concerned she had never stood up onto the path with either foot before she fell.

27. The evidence given in the course of the trial established that there were a series of CCTV cameras, totalling about 25 in number, located in and around the premises on the date of the accident and that these were recording in freeze frame mode at one frame per second instead 25 frames per second required for continuous motion picture. It was put to the plaintiff that freeze frame footage of the accident had been recorded and that this footage was about 15 minutes in length. She accepted that she had seen this video previously.

28. There was some controversy, however, as to when the plaintiff was first given the video and also about the images recorded in freeze frame, it being suggested that there were some missing seconds and that the footage may have been edited.

29. The first few minutes of the video was said to show the scene of the accident, the events leading up to the accident, the accident itself, and the immediate aftermath of the accident. The court viewed that part of the video from 4.17.35 seconds pm to 4.21.55 seconds pm. The plaintiff accepted that it was not necessary to view the remainder of the footage as the court was concerned only at the hearing with the issue of liability.

30. The video footage clearly showed the plaintiff driving up to the barrier, reversing from the barrier, into a staff car parking space, getting out of her car, crossing immediately beside or on the pedestrian crossing, and as she was just reaching the walkway, disappearing from the view of the camera behind a large sign that was in fact a plan of the car park and the premises for the assistance of visitors.

31. It was evident from the footage that the plaintiff had fallen and landed on the walkway but the video footage was of no assistance as to the cause of the fall.

32. When viewed by her the plaintiff accepted that the video showed that it was her BMW car that was seen in the footage copy, that it was she who was seen crossing the road on or along the side of the pedestrian crossing and that she was seen to be walking briskly. Evidence was given by the plaintiff's son, Scott Altaman about the freeze framing in the video. He highlighted missing seconds of footage for which he said there had been no explanation. In this regard he gave by of an example the fact that the video did not show the plaintiff's first partial crossing of the road nor did it show the plaintiff's actual fall itself nor the reason for the fall. It was also his opinion that the video footage showed the footpath/walkway to be in shadow.

33. Mr. Desmond Kirwan Browne, consulting engineer, was called on behalf of the plaintiff. He prepared two reports one dated the 25th May, 2011 and the other dated August 2011. He gave evidence that the height of the kerb above the road surface was 88 millimetres which he considered to be below the minimum safety requirement. His evidence was that the kerb height should have been between 115 and 150 millimetres.

34. In the first report of Mr. Kirwan Browne described the accident as happening when the plaintiff tripped at the kerb, that the plaintiff's foot was arrested behind her, that she was on the cobble lock when she fell, and was aware of her trailing foot catching. He added that the plaintiff felt that the manner in which she fell was such that she considered that it was the kerb that caused her to trip and fall.

35. It was Mr. Kirwan Browne's evidence that had the kerb been painted in the way in which it was subsequently to the accident and had been constructed to a height greater than 100 millimetres it would have been more visibly apparent to pedestrians. In his opinion if the kerb had not been highlighted at the time when the accident occurred then what appeared to him to have happened was that the plaintiff was unaware of the presence of the kerb.

36. The plaintiff herself took issue with the description of the mechanism of the accident contained in the report of Mr. Kirwan Browne and as a result of which the subsequent report of August 2011 was commissioned. This report also contains a description of the accident. In that report the accident is described as occurring when the plaintiff tripped over her right foot on the edge of the path falling forwards on the edge of the path and that her left foot also caught as she fell forward. The manner of her fall caused the plaintiff to believe that it was the kerb that had caused her to trip and fall.

37. Under cross examination Mr. Kirwan Browne accepted that he had received instructions from the plaintiff's then solicitor and had been furnished with an attendance on the plaintiff taken by her then solicitor which he read and from which it appeared that the accident was attributed to a combination of causes and which he considered required clarification.

38. Mr. Kirwan Browne accepted that if the plaintiff's foot was up on the footpath and her trailing foot caught on the kerb that that would indicate that she must have been aware of the kerb since a conscious decision would have been required to lift her foot up high enough to get it onto the walkway surface from the road, however, he thought that if that is what had happened then the plaintiff's left foot would in all likelihood have followed suit.

39. Mr. Kirwan Browne agreed that the double yellow lines painted along the road at the foot of the kerb which separated the road from the flower beds through which the walkway ran had the effect of highlighting to pedestrians the existence of the kerb in general. A similar effect would also be created by what he agreed was the red colour of the cobble lock pavers in the walkway.

40. The defendant's facilities manager, Mr. McGowan, has been an employee of the defendant since six months before the clinic opened to the public and was working in that capacity on the day of accident. He was alerted to the accident by a member of staff some fifteen minutes after its occurrence and gave evidence that it was he who had taken the photographs of the scene shortly after the plaintiff had been removed from there by ambulance at 5.50 pm. It follows that his photographs were taken approximately two hours after the accident. They were taken in the presence of another member of staff, Mr. Noonan, who had attended to render assistance to the plaintiff at the scene within minutes of the occurrence of the accident.

41. Mr. McGowan gave evidence that there was a general maintenance policy and programme for the grounds in the clinic. He gave evidence in relation to the subsequent painting of the kerb by the grounds man and also evidence in relation to the advices which had been received from the architect and to which reference has already been made earlier in this judgment. No instructions had been given by him regarding the painting of the step or kerb in question either as a result of the accident or otherwise. As to the question which had been raised concerning the validity of the freeze frame video his evidence was that it had not been edited or compromised in any way.

42. Carmel Mangan has been the matron of the Blackrock Clinic since its inception. It was her evidence that as matron she had both management and nursing responsibilities and that as to the former she was deputy chief executive officer. The defendant's safety procedures were such that she would have been notified of any accidents, as indeed she was in this case, but also gave evidence that during her tenure as matron she was not aware of any accident occurring in the grounds of the clinic prior to the date of this accident. She also gave evidence that the parking spaces, one of which was utilised by the plaintiff, were reserved for consultants and staff. While she remembered talking with the plaintiff subsequent to the accident by phone she did not recall the content of the conversations.

43. Cathal Maguire, consulting engineer, gave evidence on behalf of the defendant and confirmed attending at the joint inspection. He said that the account of the accident circumstances set out in his report was obtained from the plaintiff's engineer, Mr. Kirwan Browne, in the presence of the plaintiff and that it was his recollection that the plaintiff also demonstrated the accident in the way described in his report. On being cross examined in respect of this matter by the plaintiff Mr. Maguire rejected the plaintiff's suggestion that he was mistaken in his recollection. Whilst accepting that he was also told that it was the kerb which had caught the plaintiff's foot he added that it was her trailing foot.

44. With regard to the question of visibility, his evidence was that the colour of the road surface, black; the colour of the kerb, concrete; and the colour of the pavers, red; made the kerb and footpath arrangement even more noticeable than most kerbs and paths in the city of Dublin where it was a common feature for the kerbstones and the footpath surfaces to be of the same colour,

most commonly that associated with granite and/or concrete. The arrangement was, in his opinion, clearly visible at 25 feet and being the approximate distance which the plaintiff would have had to walk in order to reach the walkway from her car.

45. His evidence in relation to the measurement of the height of the kerb was the same as that of Mr. Kirwan Browne but he did not accept that there was something unsafe about the height especially when the kerb was clearly visible, moreover, on the account of the accident given to him there was no possibility that the plaintiff could have accidentally put her foot upon the walkway surface without deliberately raising her foot to do so and that therefore she must have been aware of its existence. The height of the kerb at less than four inches was a common feature throughout the city and county of Dublin. There was nothing unusual or hazardous about that. Indeed it was his opinion that the *locus in quo* was much more striking as a result of the contrasts created by the black and white surface of the pedestrian crossing, the grey colour of the kerb and the red colour of the pavers and was as a consequence obviously more visible than the footpaths commonly encountered by pedestrians all over the city and county.

Conclusion

46. The plaintiff brings these proceedings against the defendant in negligence for breach of duty and breach of statutory duty. The complaint against the defendant is in essence one relating to the static condition of the premises. The plaintiff's case in law is, put in simple terms, that the defendant was in breach of the statutory duty of care owed by it to her as a lawful visitor pursuant to the provisions of s.3 of the Occupiers Liability Act, 1995. The common duty of care towards a visitor provided by that section is a duty to take such care as is reasonable in all the circumstances to ensure that a visitor does not suffer injury or damage by reason of any danger existing on the property. Both statutorily and also formally in common law the test, therefore, is and was one of reasonable care and no more. It is also clear from the provisions of this section that the determination of the common duty to take such care as is reasonable in all the circumstances also involves having regard to the care which the visitor may reasonably be expected to take for his or her own safety. The occupier, in this case the defendant, is not in law an insurer of the plaintiff's safety in the premises. The mere occurrence of an accident does not in law result in the imposition on the occupier of strict liability for that event.

47. It is the plaintiff's case that the arrangement and walkway and kerb on the side of the road with which she was presented as she crossed over the access road constituted a hazard not just for her but for any pedestrian in the circumstances then prevailing and as described in her evidence and was therefore a danger within the meaning of the section.

48. It is my view of the evidence lead at the trial that the plaintiff was mistaken in her recollection of the following circumstances prevailing at the scene when she fell:

> (a) that the pavers were filthy dirty to the extent that they presented a black appearance or nearly black appearance in colour,
>
> (b) that it was nearly dark due to shadows cast from large trees in the vicinity,
>
> (c) that bushes were encroaching onto the roadway and onto the walkway
>
> (d) and that there was no pedestrian crossing at the *locus in quo*.

49. Quite how the plaintiff came to give the initial evidence she did in relation to the pedestrian crossing is, to put it mildly, puzzling since not only is it evident from the photographs taken by Mr. McGowan but also from the freeze frame video footage and the account she apparently gave to her engineer contained in his report that she knew not only that the crossing existed at that time but that she had actually utilised it to cross the road.

50. When the plaintiff was being cross examined her initial response to a photograph said to be of her black BMW car was that she could not confirm that it belonged to her as she could not make out the registration number though, having viewed the video footage, she subsequently accepted that it was her car.

51. Again I have a difficulty in understanding how the plaintiff came to give that evidence since whilst she may not have been aware of the photographs until shortly before the hearing she had certainly been in possession of or had viewed the video prior to that. Likewise she subsequently acknowledged that the pedestrian crossing shown in the video was present at the time of her accident and that it was she who was seen briskly crossing on or along the side of it at the time.

52. I accept as evidence the freeze frame video footage as most likely portraying both the conditions and circumstances prevailing at the time of the accident and that although taken approximately two hours subsequent to the accident the photographs also portray the topographical features which presented themselves to the plaintiff when she got out of her car. Insofar as there are missing seconds from the CCTV footage this, in all probability, was a function of the recording rather than any deliberate interference and in this regard I accept the evidence of Mr. McGowan. Even if there had been some editing at the point of the CCTV footage referred to by Mr. Altman in his evidence this would not have had any material bearing on the general conditions prevailing at the scene on the day and at the time of the accident, moreover, the plaintiff herself accepts that the person captured on the footage and seen to be crossing the road either on or along the side of the pedestrian crossing was herself. Although captured by a camera which appears to have been mounted in or about the clinic building and therefore at some distance from the scene, the daylight prevailing was such as to enable that and the other images to be clearly shown in the relevant portion of the video footage to be captured.

53. Neither the video footage nor the photographs lend any evidence to nor do they in any way corroborate the evidence of the plaintiff with regard to the effect on the lighting conditions of large trees in the vicinity, nor the colour or condition of the walkway pavers, nor in relation to the pedestrian crossing, nor the presence of bushes encroaching onto the road or footpath. Quite the contrary is the case. Having reviewed the portions of the video relevant to the issue of liability and the photographs taken by Mr. McGowan I am compelled to reject the evidence of the plaintiff with regard to those matters and which, according to her evidence, were prevailing at the time of the accident.

54. Having regard to her own evidence, I find as a fact that the plaintiff was very familiar with the Blackrock Clinic from previous visits there and was aware of the pedestrian crossing when she parked her car, moreover, as she crossed the road along or immediately beside the pedestrian crossing she was also aware from her previous experience that the pedestrian walkway was raised above the level of the access road. Even if I am wrong in reaching that conclusion in relation to her knowledge acquired from her previous visits to the clinic, I am satisfied that on the basis of the scene as portrayed in the photographs taken by Mr. McGowan and by the relevant video footage as well as on the engineering evidence of Mr. Maguire, which I accept, that even if the plaintiff had never been to the clinic the presence of the kerb at the edge of the road and the walkway was clearly visible to any pedestrian, including herself, keeping a proper lookout, paying attention and approaching from the car parking spaces as the plaintiff was on the occasion in question.

55. There was no evidence of any previous accident at the locus in quo nor any complaint relating to the arrangement of the road, walkway and kerb the subject matter of these proceedings, on the contrary, the defendants had received advice from architects concerning safety at the premises in the year prior to the accident which included the highlighting of steps elsewhere in the premises by painting these in different colours for the purposes of highlighting those for the benefit of the visually impaired but which did not include the step up from the road surface constituted by the walkway kerb nor had there been any reported or recorded complaints or accidents otherwise in the grounds of the defendant's premises prior to the accident, a fact corroborated on the discovery of documents which has been made in this case. Having had an opportunity to observe the demeanour of both Mr. McGowan and Ms. Mangan I am quite satisfied that they were reliable and truthful witnesses and whose evidence, which I have summarised in relation to these matters, is accepted by the court.

56. Insofar as it was alleged and contended that the kerb and walkway arrangement constituted a hazard or trap and was therefore a danger, the criticism levelled by Mr.Kirwan Browne regarding both the height and the highlighting by painting of the kerb was based, as he has put it in his own report and in evidence, on the premise that the plaintiff was unaware of the presence of the kerb.

57. On her own evidence and on my finding of the facts quite the opposite was the case: the plaintiff was aware of the kerb both as a result of her previous experience of the premises as well as what was there clearly visible and plainly to be seen by anyone preceding as the plaintiff was on the day and in the conditions and circumstances as portrayed by the photographic and freeze frame video evidence.

58. I am fortified in my findings of fact and the conclusions to which I have come by the plaintiff's own and very frank and fair acceptance that if a person were unfortunate enough to have an accident in the conditions and features portrayed and evidenced by the photographs and on the freeze frame video footage that that would, in her own words, be a freak accident.

59. Having regard to the facts as found and, indeed, the plaintiff's own assessment when applied to them can lead to only one sensible result in law, namely, that the arrangement which presented itself to the plaintiff on the day and at the time of her accident did not constitute a danger and that being so it seems to me unnecessary that the court determine the precise mechanism of the plaintiff's fall. In the circumstances of this case it does not necessarily follow from the fall that there was a danger present. If I am wrong about that then I would add that on the evidence I am not satisfied either as to the mechanism nor the reason for the fall.

60. There is no doubt but that the plaintiff suffered injuries and as she herself has put it suffered a lot over the years since the occurrence of this accident and which, on a human level, one cannot but have sympathy. Litigation brings its own stresses into the bargain, nevertheless, the onus is on the plaintiff to establish, on the balance of probabilities, the case that she had pleaded and made against the defendant. Having regard to the facts found on the evidence and the conclusions to which I have come the plaintiff has failed to prove her case against the defendant in accordance with the law. Accordingly, the court will vacate the order adjourning the trial of the action in relation to all issues of fact relating to the question of quantum and will make an order dismissing these proceedings.