Neutral Citation [2016] IEHC 717

THE HIGH COURT

[1621P/2014]

BETWEEN

HERBIE VAN DALSEN

PLAINTIFF

AND

DAVY HICKEY PROPERTIES LIMITED AND BT COMMUNICATIONS (IRELAND) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Fullam delivered on the 6th day of May, 2016.

Introduction

1. The plaintiff is claiming damages for personal injury in respect of an injury to his left leg sustained in a slip and fall accident on 26th August, 2011 at the National Digital Park, Citywest Park, Citywest, Co. Dublin.

2. The plaintiff is a married man with three children and is now fifty years old. At the time of the accident the plaintiff was a systems administrator employed by Elavon Merchant Services ("Elavon") based at the IDA Business Park, Arklow, Co. Wicklow. Elavon maintained a business recovery unit in the premises of the second defendant at Citywest campus.

3. The first defendant is the developer and owner of Citywest campus and, in particular, the premises Unit 4027, the address of which is Kingswood Road, National Digital Park, Citywest Park, Citywest.

4. The second defendant at all material times occupied Unit 4027 as lessee of the first defendant and carried on its business there under the name 'Telecity'.

5. On the morning of 26th August, 2011, the plaintiff travelled by Luas to Telecity for an appointment with an engineer engaged by Elavon to replace a part in its computer hardware. At approximately 9 am, in attempting to access the defendants' premises over a mown landscaped embankment between the public footpath and the defendants' car park, the plaintiff slipped on the dewy grass in making his descent and suffered a significant fracture of his right tibia.

6. Both defendants are sued as owners and occupiers of Unit 4027 under the Occupiers Liability Act, 1995. The defendants accept that the plaintiff was a visitor for the purposes of the Act.

7. The defendants are also sued for breach of statutory duty under section 15 of the Safety, Health and Welfare at Work Act, 2005. ("2005 Act").

8. Section 15(3) of the 2005 Act provides:

> *"(3) A person to whom this section applies shall ensure, so far as is reasonably practicable, that the place of work, the means of access thereto, or egress therefrom, and any article or substance provided for use in the place of work, are safe and without risk to health."*

The location

9. Citywest Park is an open plan landscaped business park. Premises are separated and screened by mounding and tree planting. Unit 4027 was built in 2000.It is located at the junction of Citywest Avenue and Kingswood Road. As one travels east along Citywest Avenue between Riverwalk Roundabout and the Kingswood Road Roundabout, Telecity is the second of two properties whose front doors face south across Citywest Avenue. The first premises, Unit 4035, is occupied by Citadel. Neither of these properties has vehicular access off Citywest Avenue. Access to Citadel is from Lake Drive on its western border. Access to Telecity (and to Unit 4029, a storage facility behind it), is via a forked driveway off Kingswood Road. Pedestrian access to Telecity is also via this driveway. Pedestrian access to Citadel is via the driveway off Lake Drive and also from Citywest Avenue by means of a footpath which has been cut through the mounding.

10. Luas services to Citywest commenced on 2nd July, 2011. A birds-eye view of the location shows two Luas stops in the vicinity, namely, Citywest Campus to the southwest and a Cheeverstown Park and Ride stop to the southeast.

11. A pedestrian coming from Citywest Campus stop on his way to Unit 4027 would walk in a west east direction via the Riverwalk Roundabout along Citywest Avenue footpath passing in front of Unit 4027, proceed up to the roundabout, turn left, continue along the footpath on Kingswood Road until he met the driveway serving Units 4027 and 4029. The driveway forks with the first branch leading to the Telecity car park and the front door of the premises; the second branch leads to Unit 4029. The distance of the pedestrian route from a point opposite the front door of Telecity via the footpath and driveway back around through the car park to the front door is 230 metres, with 150 metres on the public footpath and the final 80 metres on the private driveway. The width of the driveway is 6 metres.

12. As stated, the accident occurred as the plaintiff began his descent of the grass embankment to the Telecity car park. The grass area between the footpath up to the point of descent is level to a depth of 2.8 metres and a width of 15 metres. At the point of descent, it slopes at 30 degrees for a distance of 1.7 metres, then flattens out for a further 1.6 metres to the kerb of the car park.

The litigation

13. By initiating letter of claim dated 15th April, 2013 to the first defendant, the plaintiff's solicitors describe how he sustained his injury: *"He was making his way across the grassy knoll between the footpath and the car park outside the BT building Unit 4029 when he lost his footing. We are informed that there is no other pedestrian route by which to reach the building."*

14. Subsequently, in a letter dated 3rd May, 2013, the plaintiff's solicitors informed the defendant's insurers that *"Site investigation will show that there is no footpath to access the BT building other than that across the grass and the plaintiff followed a route which*

would be visible on inspection namely that there was a path has been carved out by frequent foot fall."

15. On 25th September, 2013, there was a joint inspection at the locus attended by,inter alia, the plaintiff and his consulting and forensic engineer, Mr. Niallo Carroll, and the defendants' engineer Mr. Donal Terry.

Pleadings
16. At paragraph 3 of the Personal Injuries Summons issued on 21st January, 2014, the plaintiff describes the circumstances of the accident as follows;

> • *The plaintiff's accident occurred when the plaintiff, who was walking along a pathway, was required as a result of the pathway coming to an end, to walk onto and across a grass area between the footpath and the car park which the plaintiff was required to use for the purpose of gaining access to the reception entrance of the premises. As the plaintiff took his first step onto the initial part of the grass area which comprised a slope and just after the plaintiff began placing his full body weight onto his right foot, the plaintiff slipped causing him to fall backwards. In order to prevent him falling onto his back, the plaintiff turned sideways to his left and put his left hand to reduce the impact with the ground.*
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> •The principal particulars of negligence and breach of duty, including breach of statutory duty alleged against the defendants were;
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> (i) Requiring the plaintiff to walk across a grass area which contained a slope for the purpose of gaining access to the reception entrance on the second named defendants' premises.
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> (ii) Failing to comply with the provisions of the Occupiers Liability Act 1995.
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> (iii) Failing to comply with the provisions of the Safety, Health and Welfare at Work Act, 2005 including sections 8, 15, 19 and 20 thereof and Schedule 3 of the said Act.
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> (iv) Failing to comply with the provisions of the Safety, Health and Welfare at Work (general applications) Regulations 2007.
>
> (v) Failing to comply with the provisions of the Buildings Regulations, 1997 by failing to provide a safe means of access to the premises, and
>
> (vi) Failing to erect notices and/or warnings of the risks and danger presented by the grass area as a means of gaining access to the reception entrance to the premises.

17. In their Notice for Particulars delivered on 3rd March, 2014, the defendants asked:

> *"7. Please confirm why the plaintiff decided to walk across the grass area".*

The plaintiff's solicitors responded:

> *"7. The plaintiff's route was the accepted pedestrian route and furthermore was the safest and shortest route to the plaintiff's destination".*

The Plaintiff's Evidence
18. The plaintiff travelled by Luas to the Citywest Campus stop. It was a dry sunny morning. He said he was wearing office shoes with rubber soles. He walked on the footpath and reached the front of the Telecity building at about 9 am. He then crossed the flat part of the grass. Although the day was dry the grass was still dewy. When he reached the point of descent he put his right foot down, slipped, felt he was going to land on his back, so he twisted to his left and heard a crack. He ended up on the flat part of the grass at the bottom of the slope. He was unable to pick himself up. He phoned his manager. Two people arrived from the Telecity building to assist him. The ambulance was called and arrived about 9.50 am. Within a couple of minutes of the ambulance arriving, the property manager of the first defendant Mr. Stephen Campbell arrived. The plaintiff was taken by ambulance to Tallaght Hospital

19. The plaintiff stated that, in the course of his work, he had visited Telecity on four previous occasions.

> a) In 2007/08, he was driven by his manager. The route took him along Citywest Avenue on to Kingswood Road and then into the Telecity car park. The plaintiff did not use the Kingswood Road access on any of the following three occasions prior to the accident.
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> b) In 2008, having entered the Citadel property off Lake Drive, he walked through the Citadel car park and continued by way of a level path into the Telecity property.
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> c) In 2009, having been dropped off by a friend, he followed the same route as the previous year but found his way blocked by a mounded area of trees which was so muddy he turned back and walked up Citywest Avenue until he arrived opposite Telecity. He said he saw someone crossing over the grass embankment to the Telecity building and entering by means of a swipe card in "a confident manner". He followed suit as it made perfect sense to cross there.
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> d) In 2010, he got off the Luas at the Citywest Campus stop and walked directly to the point on the footpath opposite Telecity from where he crossed without difficulty, as he had done in 2009.

Cross-examination of the Plaintiff
20. It was suggested to the plaintiff that he knew from his first visit to Telecity that the designated entrance was by way of the driveway off Kingswood Road. The plaintiff maintained that that was an entrance for vehicles only as no footpath was provided. He said he had seen the way cars were driven in the area; he instanced the "*crazy driving of a Toyota Camry*". He said he was not prepared to walk with his back to the traffic. He was asked why he could not walk on the flat area of grass inside the kerb if he was

afraid to walk on the road. He said that would have involved walking six or seven hundred metres further around to come all the way back. It was put to him that the accident was caused because he did not use the right access, that there would have been no injury if he had travelled on the access route provided. He did not agree. He said: "*If I was walking and a car had hit me, where would I be?*" He said walking on the driveway was not an option.

21. When asked who had recommended the route he had taken he replied "*Nobody*." He was told that the evidence would be that the designated access for pedestrians and vehicles was via Kingswood Road. He replied that the defendants' website said differently; it showed a route through Citadel's property. That was the route he took in 2008 as depicted in figure 2 in his engineer's report of 7th January, 2016.It was put to him that he could not have had reference to any website plan in making his first journey as the manager of the site would say that the website image was not put in place until 2012. He said:- "*I must have gotten it somewhere*". It was put that the slope was not a proper access and was in fact dangerous. He said he believed in 2009 that it was the proper access; he had been successful on the two previous occasions. He stated he had seen an employee using the slope.

22. When put to him that there were no signs of wear and tear on the grass or pedestrian markings on the car park suggesting pedestrian access from the slope, he stated he saw no other option of accessing Telecity. It was put to him that he did not use common sense when he decided to use the slope which was wet with dew. He said he used his experience from the two previous occasions. The plaintiff denied telling the defendant's engineer at the joint inspection that:- "*I took a short-cut*" in explaining his decision to use the slope.

Evidence of Mr. Niallo Carroll
23. Mr. Carroll was called on behalf of the plaintiff. He had attended at the joint inspection. He furnished two reports dated 10th October, 2013 and 7th January, 2016. Mr. Carroll criticised the design and construction of the pedestrian access to the Telecity premises as not being in accordance with best practice for urban planning as described in publications such as Design Manual for Urban Roads and Streets published by the Department of Transport, Tourism and Sport and design guidelines for business parks and industrial areas. He said that best practice requires permeability and legibility in urban design. Permeability encourages pedestrian travel by reducing travel distances, opening up more access points and approach routes, and taking account of pedestrian "desire lines". Legibility requires that the approach routes be laid out in a way that is obvious and if this is not possible by the alignment of the pathways, then clear signage is required.

24. Mr. Carroll stated unit 4027 is neither legible nor permeable. He said there were no signs, it was difficult for pedestrians to know how to get into the building. He said that without signs it was counter intuitive for pedestrians to walk beyond the target. He was of the opinion that the driveway was not a reasonable or safe route. There was no specific provision for pedestrians or bollards, markings or crossing points. There was a sharp bend on the driveway such that a pedestrian would not see the target building until he or she had passed the bend. The driveway was contrary to HSA guidelines which required that pedestrian and vehicular traffic be segregated. He said that crossing from one side of the driveway to the other was unsuitable.

25. Mr. Carroll stated that the fifteen metre gap in the mound in the front of the Telecity reception area invited crossing there. He said the slope was a hazard; there was no warning sign. He stated that it would have been a straight forward matter for the defendants to provide a path as had been done at the Citadel property. All it required was a digger and ton of gravel.

26. In cross-examination, Mr. Carroll denied his criticisms were a counsel of perfection. He agreed there was no statutory basis for the requirements of permeability and legibility. It was put to him that the plaintiff knew the way in and did not have to be directed by signs. He said that cars and pedestrians do not travel the same route. There was a general requirement for directions. He agreed that there was no sign of pedestrians' wear and tear on the bank at the time of inspection. He accepted that there would have been no accident had the plaintiff used the designated access. He disagreed with counsel that the set up was no different to what you would find at supermarkets. He concluded that on the basis of the HSA guidelines, the driveway was not safe for pedestrians.

27. Mr. Carroll was cross-examined in detail on map 1 used in his first report and various alleged discrepancies in his instructions and his conclusions. He said map 1 in his first report was taken from the first defendant's website. He accepted he had not checked whether the map had been up on the website prior to 2011. He accepted that what is described as a faint white line on Map 1 is reproduced in Figure 2 of the second report as a route through the Citadel property to the reception at Telecity. He accepted that that was incorrect as that white line did not in fact go into the Telecity property but diverted to the left into the engineers refrigeration facility at Citadel. He apologised for not having been thorough in this respect.

28. Mr. Carroll denied changing his report because the plaintiff's account of the accident had changed. He said that the plaintiff had not been able to convey the full picture to counsel. He was asked if he did not think the fact that the plaintiff had not instructed him that he had travelled to Citywest on the first occasion by car was important. He said he looked at the issue from the point of view of a man travelling on the Luas. He was again asked if he did not think it was important that the plaintiff had travelled by car in 2008 before ever arriving by Luas. He agreed but said it would not affect his conclusion. He accepted that the plaintiff's narrative of having travelled by Luas in 2009 and 2010 was an inaccuracy as the Citywest campus Luas stop only opened on 2nd July, 2011. He said he was focussing on the fact that the plaintiff approached Telecity on foot. He accepted that the plaintiff had not told him that on the second visit, his route through Citadel was blocked. He said that this and the other matters were "small inconsistencies" which the plaintiff subsequently clarified and they do not affect his conclusions.

29. At the end of his evidence he accepted that separate entrances for pedestrians and vehicles for such places as shopping centres were not everywhere. He was asked, given that Telecity had thirteen employees, whether it was necessary there should be a dedicated footpath. He said the issue was not the number of employees, one had to take visitors into account.

30. Finally, he was asked whether the 'reasonably practicable' test had been met by the provision of the driveway to the entrance of the Telecity building through a car park and he agreed that it was.

Evidence of Mr. Stephen Campbell
31. Mr. Campbell had been property manager of the first defendant for over ten years. He said that the grass bank was not the designated pedestrian entrance and was not used as a means of access. The Kingswood Road entrance was the designated entrance since 2000. In that period there had been no complaints about the access and there had been no reports of accidents on the driveway. He was not aware of any speeding by a Camry car.

32. The gravel path beyond the Citadel reception area turns to the left into the plant engineer's refrigeration facility. There is no access to Telecity through the Citadel property. The landscape between the two properties had not been altered.

33. Mr. Campbell believed there was no need for signage for pedestrians. Telecity had thirteen employees, it had very few visitors, it

was not a public business and did not encourage visitors other than those coming for specific business reasons. He never saw anyone using the grass bank for access to Telecity. He said there was a low bank there for visibility purposes.

34. In cross examination, he said that the footpath from Citywest Avenue into Citadel was put in by Citadel. He said BT could have done the same for unit 4027.

35. Mr. Campbell agreed that the plaintiff's route was dangerous and he would not walk down the bank himself. He did not agree that the low bank constituted an invitation for people to enter the premises that way. It was put to him that the design did not comply with the HSA guidelines. He said it was acceptable under the legislation and signed off by their architects. He said that he had not taken any steps as a result of the plaintiff's accident. He said it was an unusual act and it did not make sense.

Evidence of Mr. Donal Terry
36. Mr. Terry gave evidence on behalf of the defendants. He attended the joint inspection. Mr. Terry stated that in the plaintiff's narrative of the accident at the joint inspection, he made no mention of a visit by car. He said he took a note of the plaintiff's statement to them that he had taken a shortcut down the grassy bank. He told the engineers that he had used the shortcut on all previous occasions.

37. Mr. Terry described the slope as six times steeper than a pedestrian ramp. He said there were no signs of pedestrian traffic marks on the grass. He said that, in the course of their inspection, he saw one person emerge from Telecity and walk up the slope. He said the Telecity premises could be safely accessed by pedestrians on the driveway. It had a good hard level surface. There was a common juxtaposition of cars and pedestrians. He said the developers acted reasonably. He was not saying the driveway could not be improved.

38. He said the HSA guidelines had no statutory basis. They were merely guidance for workplaces where vehicles operated as part of the work process such as forklifts, pallet trucks, reach lifts and delivery vans. He said the means of access designated was safe. The route the plaintiff took was not safe. He had taken a shortcut and had taken a risk not worth taking.

39. He said the flat grass in front of the Telecity premises was not an invitation to enter at that point. He said the Telecity property was well laid out and it was purpose built with a designated entry off Kingswood Road. There was no obligation on an occupier to barrier off all possibilities. There had been no accidents in the eleven years of operation of the premises.

40. In cross examination, he agreed that there was no reason why Telecity could not have provided a pedestrian entrance as Citadel had done. It was suggested that had there been a pathway the accident would have been prevented. He said there was no set down area on Citywest Avenue for people arriving by taxi. He agreed that if it was clear that employees were using the embankment as a means of access, it was incumbent upon the defendants to say- "*Don't do it*". In this regard however, he said the most significant evidence was the grass itself and there was no evidence from an inspection of the grass that a practice of pedestrian usage existed. He said Telecity had thirteen employees which was a small number.

41. Mr. Terry did not accept that there was a need for signage for a private business to which the public was not invited. In response to a suggestion that people going to Telecity for the first time would have to guess where the access was, he said that they were there by invitation or arrangement or instruction. He said that on entry to the Citywest Complex there was a campus plan showing all the properties which had unique numbers. In the circumstances, he said specific signage was not required.

42. He said there was no statutory requirement that the means of access be segregated as between pedestrians and vehicles.

43. He said the driveway was six metres wide and allowed contra flow. Vehicle numbers were low and the risk to pedestrians was low. He said the driveway was wide and there was room for everybody. He said the HSA guidelines do not prescribe segregation.

44. It was put to Mr. Terry that the Safety, Health and Welfare at Work (General Applications) Regulations 2007 prescribed segregation of pedestrians and vehicles. Mr. Terry said that the Regulations did not prescribe mandatory segregation. He was referred to Regulation 14. Paragraph (a) requires that outdoor and indoor places of work be organised that in such a way that pedestrians and vehicles can circulate in a safe manner. Paragraph (d) requires sufficient clearance for pedestrians if means of transports are used in traffic routes. Paragraph (f) requires that pedestrian and traffic routes are clearly identified.

45. Mr. Terry said, in general terms, that the Regulation applied to the movement of pedestrians and vehicles in danger areas, as the side note to the Regulations provides, such as warehouses or workplaces were forklifts and other means of transport carry articles to workstations. Mr. Terry stated that there is no indication that there was a risk operating in terms of the juxtaposition of vehicles and pedestrians at the premises. The kind of danger against which these measures must be adopted does not exist in the present circumstances.

The evidence of Francis Clinton
46. Mr. Clinton was employed by Securitas a company which provided security for the Citywest Complex. In August 2011 he was in his fourth month in his position. He is still employed by that company at Citywest. He said that the complex is covered by CCTV and two van patrols.

47. Mr. Clinton described a fraught exchange on 18th August, 2013 when the plaintiff knocked on the gate of the control room of the CCTV system. He said he wanted to speak to the security officer who was on duty on the day of an accident. The plaintiff did not know the name of the security guard. Mr. Clinton was unable to help him.

48. Mr. Clinton said that following the accident in August 2011, the manager decided to place a camera on the accident locus for 24 hours a day for one week and get a short report thereon. Mr. Clinton said there was nobody observed crossing during the week.

49. On cross examination, Mr. Clinton said that Mr. Van Dalsen was menacing and aggressive on the day he turned up at the control.

Submissions on behalf of the Plaintiff
50. Mr. Woolf said that the plaintiff's case was based on two sets of breaches of statutory duty namely; (1) the general duty of occupiers to visitors under s. 3 of the Occupiers Liability Act 1995 and (2) strict and absolute duties on a person deemed to have control under s. 15 of the 2005 Act and the obligation to carry out a risk assessment under s. 19 of the same act. Mr. Woolf also referenced the Safety Health and Welfare at Work (General Applications) Regulations 2007

51. Mr. Woolf submits that an occupier has a general duty to take reasonable care for the safety of visitors on premises. However, he

states that under s. 15 the duties of the occupier intensify greatly. The policy of the section is to extend the scope of the duties of an employer to independent contractors. In essence, persons having control of a place of work owe a statutory duty to ensure it is safe and without risk to health. Mr. Woolf submits that unit 4027 was a place of work for the plaintiff on the day of the accident.

52. Mr. Woolf submits that the report of defendant's engineer acknowledged that the slope was "an extraordinary hazard of slip and fall". He says that given that the mound was cut away, the risk was clearly foreseeable. It was reasonably practicable to provide an alternative footpath to obviate the risk materialising. That is clear from the footpath cut through the mound into the adjoining Citadel premises.

53. Mr. Woolf further submits that the defendants had failed to carry out a risk assessment in accordance with s. 19 of the 2005 Act. He submits that had that been done the accident might not have happened.

54. In regard to contributory negligence, Mr. Woolf submits that the danger did not occur to the plaintiff; there was no evidence that he appreciated the danger. In this regard Mr. Woolf refers to the last page of Mr. Terry's report where he states- *"He (the plaintiff) did not recognise the existence of the hazard (or alternatively he ignored it) and indeed went on to attempt to descend the steep bank".*

55. Mr. Woolf concluded that the court should be slow to make a finding of contributory negligence against the plaintiff relying on the statement of principle set out in pages 11 and 12 of the judgment of the High Court in *Dunne v. Honeywell* [1991] ILRM 595 :

> *"Contributory negligence in an action for breach of statutory duty has a different meaning from contributory negligence in an action for negligence at common law. In the former case the employee is not guilty of contributory negligence merely because he was careless or inattentive, or forgetful, or inadvertent. This meaning is taken from a passage in the judgment of O'Dalaigh CJ in Kennedy v. East Cork Foods [1973] IR 244 at p. 249. There he is citing with approval part of the charge of the trial judge to the jury in a case where a jury had found contributory negligence against the plaintiff in relation to his claim for common law negligence but had exonerated him of contributory negligence in his claim for breach of statutory duty. The passage to which he referred continued:*
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> > *It must be shown that he did something rather more than that. He must enter into the realm of downright carelessness, because the Factories Act was passed for the express purpose of saving factory workers from their own carelessness, and their own inattention.*
>
> *The plaintiff was not taking sufficient care for his own safety, not through any positive act on his part, but because the danger did not occur to him. For this reason having regard to the principle of law to which I have referred, the plaintiff was not guilty of contributory negligence in relation to his claim for breach of statutory duty. He is accordingly entitled to recover in full against Virginia for breach of statutory duty."*

The Defendant's Submissions

56. Mr. Antoniotti submits that the accident occurred as a result of the plaintiff's own carelessness. Section 3 of the Occupiers Liability Act, 1995 provides that the occupier of premises owes a common duty of care towards a visitor which means to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or own safety) to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon."

57. Mr. Antoniotti submits that the occupier's duty related to the state of the premises. There was no danger on the driveway and the defendants were not in breach of the Occupier's Liability Act 1995. He said it is not possible to ensure that every possible danger must be walled, fenced, barriered or bollarded in case a visitor decides not to go the designated way.

58. Mr. Antoniotti concedes that the first defendant is in control of the means of access to the premises for the purposes of s. 15 of the 2005 Act. He points to the significance of definite article as referring to the designated means of access and not every conceivable means of access. He says the duty relating to the ensuring the safety of the means of access relates to the duty to repair. He says the driveway which caters for thirteen employees was a wide paved roadway in respect of which there had never been complaints.

59. Mr. Antoniotti submits that the plaintiff's engineer Mr. Carroll answered his last question in cross-examination by accepting that the provision of pedestrian access to Telecity along the driveway and through the car park met the "reasonably practicable" test. He suggests that to say otherwise would mean that every place of work having mixed driveway access such as schools and golf clubs would require be walled and fenced.

60. Mr. Antoniotti said the letter of claim of 15th April, 2013 refers to the plaintiff making his way across a grassy knoll, losing his footing*, there being no other pedestrian route*. He submits that what the plaintiff did not tell his solicitors was that there was another access route. What he told his solicitor was entirely wrong; he did not mention previous visits. The letter of 3rd May, 2013 is extremely important. That stated that there was no footpath other than across the grass, and that there was a path carved out by frequent footfall. This statement was made at a time where the plaintiff had not carried out any inspection. He told them that he saw a carved out footpath. He did not make the *'carved out path'* case in court. Inspection on 25th September, 2013 showed that there was no carved path; if there had been, that would have been the end of the case. Mr Antoniotti asks- "*What did the engineer do*?" Mr. Antoniotti suggested that the engineer decided that signs or the absence of signs was the problem. So he asks- "*What does the engineer say?* He says - "*The gap encouraged or invited people to cross*". But, Mr. Antoniotti submits, the plaintiff never made that case, his case was there was a carved out footpath. He submits the engineer then decides: "*Let's make the level gap case*". But the most important piece of information was not given to the engineer which was that the plaintiff had known the correct access route from the time of his first visit when he had driven up the driveway and entered Telecity through the car park. Mr. Antoniotti submits that if the engineer knew that, there would have been no reference to signs. In the circumstances, signs were irrelevant because the plaintiff knew the designated way.

61. Mr. Antoniotti submits that the plaintiff had not told his engineer at the joint inspection that he followed a person he saw cross the embankment and enter the Telecity building using a swipe-card. That information is not in his engineer's first report of 10th October, 2013.

62. Mr. Antoniotti submits that the plaintiff's evidence is not credible. His case at the outset was that there was a path carved out. That case was changed to a lowered gap inviting access, and changed again to the absence of signs. His engineer tried to fit facts into a case of breach of statutory duty without knowing the true facts. Mr. Antoniotti submits that there was no plea that the gap

constituted an allurement.

63. Mr. Antoniotti submitted that the reason the plaintiff intentionally hid the information from his engineer was that he knew it would hurt his case. He referred to the plaintiff's demeanour in the witness box and listed what he described as "mistakes" on the part of the plaintiff and his engineer. In particular, he suggested there was an attempt to 'pull the wool over peoples eyes' by trying to convince the court that the map taken from website showed a route through Citadel to Telecity. He also referred to the plaintiff's evidence that his reason for using the slope was his fear of being hit by a car. He submitted that the plaintiff never told his engineer or anyone else that he was afraid to walk down the driveway. He said that was made up when he knew Mr. Carroll was going to give evidence regarding the mix of the pedestrians and vehicles.

64. In summary, Mr. Antoniotti submits that the plaintiff has made up a case over the years. He changed the carved path story to 'made up' facts to bring his case within the scope of the legislation. The plaintiff acted in an extremely careless manner; he took a chance. There were no breaches of duty under Common Law, under the Occupiers Liability Act, 1995 or under the Safety and Health and Welfare at Work Act, 2005.

Discussion
65. The parties accept that the relevant legislative provisions applicable to the case are: (a) s. 3 of the Occupiers Liability Act 1995, and (b), s. 15 of the Safety Health and Welfare at Work Act 2005.

66. While the Safety Health and Welfare at Work (General Application) Regulations 2007, in particular Regulation 14, were referred to, the plaintiff's counsel recognised that they might not apply to the facts of this case. It seems to the court that this reservation is well founded. Regulation 14 imposes absolute duties on employers. According to the side-note, Regulation 14 applies to the 'Movement of Pedestrians and Vehicles in Danger Areas' The regulation itself is concerned with indoor and outdoor workplaces where vehicles and pedestrians mix. It seems to me that the workplaces envisaged there are indoor workstations and warehouses in which vehicles such as forklifts and indoor means of transport are used, on the one hand, and on the other, outdoor places of work such as a builder's provider's yard with regular movement of people, vehicles and goods.

67. In general terms, s. 15 of the 2005 Act is concerned with imposing duties on persons in control of three distinct physical areas, (1) the place of work, (2) access thereto, and, (3) egress there from. The test is based on a standard of reasonable practicability. That is not an absolute standard. This case is not concerned with the physical state of the Telecity workplace, but rather with access to, and egress from, the place of work. Regulation 14 makes no mention of access or egress. It seems to the court that if the legislature intended a regulation imposing absolute duties to apply to access or egress to or from the place of work it would have done so in express terms.

The Occupiers Liability Act 1995
68. The defendants accept that the plaintiff was a visitor. In the circumstances, the defendants owed him the common duty of care, that is *'to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety), to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon.'* The definition of *'premises*' in section 1 includes *'land'.*

69. At the outset it is necessary to record that the plaintiff changed his account of the accident a number of times since 26th August, 2011. It is clear from a comparison of the plaintiff's evidence with initiating letters from his solicitor, the pleadings and the report of his engineer, that he had withheld material information from his solicitor and his engineer. In the view of the court, significant parts of the plaintiff's evidence bearing on liability were not credible.

70. The most important fact withheld was his first visit by car. In particular, the court finds that there is no level or indeed any defined pathway through the Citadel property to the reception area of Telecity. The properties are separated by a high bank containing mature trees. In this regard, Mr. Carroll belatedly accepted that his report incorrectly represents the position as shown on the map on the Telecity website. Furthermore, the evidence shows there is no "carved out path" from frequent footfall leading from the roadside footpath across the grass bank to the Telecity reception area. There is no evidence,as claimed in the reply to particulars no 7, that the route the plaintiff took was the accepted pedestrian route. The late introduction into the narrative of seeing and following an employee across the bank, and his exaggerated fear of walking on the driveway are self-serving and not credible.

71. The plaintiff says that the grass bank was a hazard about which he should have been warned by signage. The defendants state that they fulfilled their duty of care to the plaintiff by providing an ample driveway for pedestrians and vehicles which was safe and in good condition. The plaintiff knew that the driveway was the only designated entrance and had used it on his first visit to the premises. His second and third visits were completed on foot. On the third visit he successfully negotiated a short cut across the grass bank. On 26th August, 2011, the day of the accident, he again knowingly took the short cut, but unfortunately not successfully on that occasion.

72. The court is satisfied the driveway provided a safe means of access for visitors. An occupier's duty is to take reasonable care for the safety of visitors. The defendant occupiers met that duty in providing a proper means of access. The plaintiff did not suffer his injury as a result of the defendants' failure to provide a reasonably safe means of access to their premises.

73. If the occupier knew that the embankment was being used as a means of access and egress then there would have been a duty on him to take reasonable precautions such as warning signs to prevent people using the slope. There was no evidence that the defendants were so aware. Specifically there had been no reports of any accidents on the slope or complaints in relation to the slope.

74. An occupier is not expected to be an insurer against all risks. That the slope was a hazard and that the accident was foreseeable comes with hindsight. This accident was not caused by the failure of the defendants to provide warning signs. The plaintiff had been over the course before. He knew where the designated entrance was, it was not across the bank. The absence of warning signs is irrelevant.

75. For the sake of completeness, the plaintiff's engineer sought to suggest that the gap in the mounding represented an invitation to visitors to cross at that point. Yet allurement was not pleaded. In the court's view, this is an attempt to shore up the gap in the plaintiff's case after inspection disclosed the carved out path did not exist.

76. In my view the defendants complied with their obligation of reasonable care under section 3 of the Occupiers Liability Act, 1995.

Section 15 of the Safety, Health and Welfare at Work Act, 2005
77. Section 15 describes the obligations of an employer to persons in control of places of work or the access or egress thereto or

there from. The obligation is to ensure so far as is reasonably practicable to ensure that the place of work, the means of access thereto or egress there from and any article or substance provided for the use in place of work, are safe and without risk to health.

78. The duty was considered in *Boyle v. Marathon Petroleum (Ireland) Limited* [1999] IESC 14, O' Flaherty J. stated at page 466:

> *"I conclude that the learned trial judge reached the correct decision. I have no doubt that the onus of proof does rest on the defendant to show that it did what was reasonably practicable. I am also of the opinion that this duty is more extensive than the common law duty which devolves on employers to exercise reasonable care in various respects as regards their employees. It is an obligation to take all practicable steps. That seems to me to involve more than that they should respond that they, as employers, did all that was reasonably to be expected of them in a particular situation. An employer might sometimes be able to say that what he did by way of exercising reasonable care was done in the "agony of the moment," for example, but that might not be enough to discharge his statutory duty under the section in question."*

79. The duty is not an absolute one (*Thompson v. Dublin Bus* [2015] IESC 22).The duty is clearly more onerous than the duty on an occupier. The onus is on a defendant to prove that he has gone as far as is reasonably practicable to ensure the safety of the workplace or the means of access or egress thereto or there from. The legislature intended to impose duties on individuals who were not the immediate employers of workers at the workplace. Such persons in control would include landlords in the case of premises leased to an undertaking specifically having obligations under leases to maintain roadways or buildings or fixtures and fittings or equipment thereon. Persons in control would also include a contractor whose employees were engaged in performing services at the workplace.

80. Section 15 refers to the means of access. In this case the defendants provided a driveway for it's thirteen employees. The second defendant's business was private in the sense that access to the building was by means of swipe card. It was in effect locked to the public. It had a small car park with forty places. There was no suggestion that the driveway was in any way defective. It was wide enough for contra- flow traffic. There was no real criticism of the roadway design apart from the fact that it contained a sharp bend. The plaintiff's final criticism was based this on his alleged fear of walking on the road.

81. The court concludes that this is not credible having regard to the fact that it only emerged for the first time in his evidence and had not been suggested to his solicitor or his engineer at any stage. The case pleaded was firmly rooted on the grass path being the accepted pedestrian route. The joint inspection showed there was no well trodden path across the grass.

82. The reality is that a visitor coming from the Luas stop at Citywest Campus has to walk past the reception area of Telecity to come back around to the car park for the purposes of entering the building. This may be inconvenient for visitors but it does not amount to a breach of statutory duty. There is no obligation on an employer to provide separate entrances for drivers and pedestrians. Mixed access is a common feature of workplaces such as schools, sports clubs and supermarkets. The fact that a gravel pathway was carved out for the Citadel premises is not relevant.

83. This accident did not occur as a result of the defendants' breach of duties under section 15 of the 2005 Act. In the courts view, the defendants provided a safe means of access to its workplace. The accident occurred because the plaintiff chose not to use the designated access. There was no evidence that the defendants were aware that people were using the embankment as a means of access. In the circumstances, the defendants cannot be faulted for not carrying out a risk assessment.

84. The accident was caused as the result of the plaintiff's disregard for his own safety. He took a risk in attempting to descend a slope with a gradient six times steeper than the acceptable pedestrian ramp. In my view the defendant is fully responsible for his own injuries.

Decision

85. I will dismiss the case against the first and second defendants.