[2020] IEHC_76

THE HIGH COURT

[2016 No. 1937P]

BETWEEN

GARY TURNER

PLAINTIFF

AND

THE CURRAGH RACECOURSE,
CURRAGH RACECOURSE HOSPITALITY,
TRACEY COLLINS,
AND SHEENA COLLINS

DEFENDANTS

JUDGMENT of Mr Justice David Keane delivered on the 21st February 2020

Introduction

1. Shortly after 9 a.m. on the morning of Saturday, 6 September 2014, an unusual, if not unprecedented, accident occurred at the Maddenstown Gallops ('the gallops') on the Curragh plain in Kildare, when the plaintiff, Gary Turner, who was out for a run, collided with a galloping racehorse that was being ridden by a jockey there.

2. The first and second defendants, The Curragh Racecourse and Curragh Racecourse Hospitality Limited respectively, are the corporate entities that manage the various gallops on the Curragh and operate the nearby Curragh Racecourse. In this judgment, I will refer to those two companies collectively as 'Curragh Racecourse'. It is common case that Curragh Racecourse has assumed the rights, interests and obligations of the trustees of the Turf Club under an indenture with the Minister for Defence ('the Minister') of 10 September 1968 ('the licence of 1968'), whereby the Minister licensed the trustees to use certain lands on the Curragh as grass gallops. In turn, Curragh Racecourse now licences racehorse trainers to use those gallops for training purposes.

3. By s. 2 of the Curragh of Kildare Act 1961 ('the Act of 1961'), the lands of the Curragh plain were vested in the Minister, subject to any existing interests in those lands and to the existing rights of way, rights to pasture for sheep (as rights of commonage) and other rights affecting them specified in the Curragh of Kildare Act 1870 ('the Act of 1870').

4. The Minister's control of the Curragh lands is the result of the presence there of the Curragh Military Camp, which, together with the military camp at Aldershot in Hampshire, England, was first established in response to the outbreak of the Crimean War in 1854. Over 30,000 Irishmen served in the British army during that war. Concern about the effect of the establishment of a permanent military camp on the continued enjoyment of existing rights and interests in the use of the Curragh lands led to the establishment of a commission of inquiry in 1866 and to the subsequent passage of the Curragh of Kildare Act 1868 ('the Act of 1868'). Among the purposes of that Act, as explained in one of its recitals, was 'preserving the Use of the Curragh for the Purpose of Horse Racing and the Training of Race Horses.' According to the entry on the Curragh in the 1911 edition of the Encyclopaedia Britannica: 'The word cuirrech, cognate with the Latin *cursus*, signifies a race-course, and chariot-races are spoken of as taking place on the Curragh as early as the 1st century A.D.' It is thus evident that from time immemorial the Curragh has been

recognised as a centre, if not the centre, of horseracing activity on this island and that its status as such has been the subject of express statutory recognition for over 150 years.

5. The third defendant Tracey Collins is a racehorse trainer. The fourth defendant Sheena Collins is a sister of Tracey Collins. At the material time, Tracey Collins was the trainer of the three horses that were involved in the accident that is the subject of these proceedings and Sheena Collins was her employee.

The Curragh Acts

6. The Act of 1868 gave statutory recognition to the already extant, common law office of Ranger of the Curragh, and created the additional office of Deputy Ranger. As the title of the office implies, the Ranger's role was the preservation and management of the Curragh plain. The Ranger was given the power to appoint two bailiffs to assist the Deputy Ranger. Separately, the Act of 1868 created three Curragh Commissioners to inquire into, amongst other matters: first, what rights to pasture sheep (by way of commonage), rights of way or other rights existed over the Curragh; second, what persons were the beneficiaries of any such rights, for what period and over what lands; and third, what compensation should be given to any party whose rights were, or may be, injuriously affected by the Act's stipulation that the Minister for War was to have exclusive use of the Curragh Camp, use and control of the Curragh rifle range, and use of the remaining Curragh lands whenever necessary for military purposes. Subject to that stipulation, all rights to pasture sheep, rights of way and other existing rights over the Curragh lands were to continue, as though the Act of 1868 had not been passed. In a series of provisions that remain unrepealed, The Curragh of Kildare Act 1870 ('the Act of 1870') gave statutory recognition to the relevant awards and findings of the Curragh Commissioners and introduced a further stipulation that no animals other than sheep may be pastured on the Curragh lands.

7. The office of the Ranger was effectively abolished when the Act of 1961 repealed the Act of 1868 in its entirety. However, the Curragh Bye-Laws 1964 ('the Bye-laws'), made by the Minister in exercise of the powers conferred on him by s. 16 of the Act of 1961, created the roles of 'Head Bailiff' and 'Under Bailiff' as employees of the Minister to carry out various duties in relation to the preservation and management of the Curragh plain. To that end, the Head Bailiff was given certain express powers under the Bye-laws. Subsequently, under s. 1 of the Curragh of Kildare Act 1969 ('the Act of 1969'), the person conferred with the powers, and charged with the duties, of the Head Bailiff became known as the *Maor* and the Under Bailiff became known as the *Fomhair*. The functions of those persons under the Act of 1969 and the 1964 Bye-laws, as amended, principally involve the regulation of the exercise of sheep-grazing rights and the enforcement of the restriction on keeping or grazing other animals on the Curragh lands.

The licence

8. Under the licence of 1968, the Minister granted the trustees (for present purposes, Curragh Racecourse) licence and authority to use certain identified Curragh lands, including the gallops, as grass gallops for horse training purposes, with the right to pass and repass at all times over the remainder of the Curragh lands (apart from the military

camp and rifle range) in order to do so, but excepting and reserving all existing rights to pasture sheep (by way of commonage), rights of way and other rights, including the rights of the Minister, over all of those lands. In return, Curragh Racecourse covenanted with the Minister, in relevant part:

> '...
>
> (iii) Not to enclose [the lands the subject of the licence, including the gallops] or any portion thereof.
>
> (iv) Not to erect any building or permanent structure of any type on [the lands the subject of the licence, including the gallops] or any portion thereof.
>
> (v) Not to erect any fences hurdles starting gates or other structures on [the premises the subject of the licence, including the gallops] or in any other part of the Curragh other than [the racecourse and surrounding lands, which do not include the gallops] without the prior written consent of the Minister.
>
> ...
>
> (ix) To indemnify and keep indemnified the Minister his successors and assigns against all claims expenses demands or proceeding whatsoever in respect of accident or injury to persons or animals or damage to property arising out of the exercise of the Licence hereby granted or out of rights of common pasture or otherwise howsoever.
>
> ...'

The pleadings

9. In the personal injuries summons that issued on his behalf on 2 March 2016, Mr Turner claims that his collision with a racehorse was caused by the negligence and breach of duty of the defendants, so that they are liable to compensate him in damages to for the injuries to him that resulted.

10. Mr Turner pleads that Curragh Racecourse was negligent or in breach of its duty to him in: permitting racehorses to gallop on that part of the Curragh lands; failing to protect him from galloping horses at that place; failing to warn him of the presence of galloping horses there; failing to provide a barrier to his entry onto the gallops; and breaching its obligations to him under the Occupiers' Liability Act 1995 and the Safety, Health and Welfare at Work Act 2005.

11. Mr Turner pleads that, as racehorse trainers, the Collins sisters were negligent or in breach of their duty to him in: permitting racehorses to gallop at the gallops; failing to keep an adequate lookout for persons such as Mr Tuner coming on to the gallops while racehorses were exercising there; failing to have the galloping racehorses take evasive action; failing to warn Mr Turner of the galloping horses' approach; and breaching their obligations to Mr Turner under the Safety, Health and Welfare at Work Acts.

12. In its defence, delivered on 24 August 2016, Curragh Racecourse admits that the accident occurred but denies negligence. Further, or in the alternative, Curragh Racecourse pleads that the accident was caused in whole or in part by Mr Turner's own negligence in: running into the path of the galloping racehorses; failing to keep a proper lookout; failing to stop or change course; failing to heed shouted warnings; and playing music on headphones that prevented him from hearing either the sound of the approaching horses or the shouted warnings of their approach.

13. In their defence, delivered on 16 December 2016, the Collins sisters place Mr Turner on strict proof of every aspect of his claim, before pleading that Mr Turner's accident was caused, or contributed to, by his own negligence in; disobeying warnings or prohibitory notices against going on to the gallops at that time; trespassing on the gallops; failing to draw on the local knowledge that he had or ought to have had of the use of the gallops by racehorses; failing to keep a proper lookout; causing the collision by running into the path of the galloping racehorses; wearing headphones and playing music on them while running across the gallops in a manner that prevented him from hearing the approach of the racehorses or the shouted warnings of their approach; continuing to run while unsighted by the low level of the sun in the sky or failing to take the appropriate steps to avoid being unsighted in that way while running; causing an emergency by running into the path of the galloping horses; and failing to stop before colliding with them. The Collins sisters also expressly plead that Sheena Collins was an employee of Tracey Collins and not a racehorse trainer in her own right, so that she can have no possible liability in respect of Mr Turner's claims.

Background

14. Mr Turner, a transport manager with his own company, was 46 years old when the accident happened. At all material times, he has lived in Newbridge, just half a mile - by his estimate - from the townland of Athgarvan at the eastern edge of the Curragh. He runs to keep fit and has participated in organised 10km events. For approximately eight years prior to the accident, he had been running on the Curragh three or four times a week. He invariably took one of two routes; a long and a short run. Only the long run took him over the gallops.

15. On the Saturday morning when the accident occurred, Mr Turner was not working and had decided to go for a run. He drove from his home in Newbridge to the carpark of Athgarvan National School and set off on his run from there. It was a sunny morning. He ran westwards initially, along a route south of the M7 motorway and north of the Curragh Camp. He was wearing earphones, through which he was listening to music. Before reaching the western edge of the Curragh, he turned left and continued in a south westerly direction parallel with the metal palisade fence on the north west side of Camp. That palisade fence surrounds the Camp Armoury.

16. Mr Turner continued straight ahead in a south westerly direction past the corner of the palisade fence, where it turns ninety degrees to run south east. Just before he reached a point level with the corner of the palisade fence on his left, he passed on his right a set of mobile practice starting stalls for racehorses. Although Mr Turner professes not to have

known it, once he passed that point, running in that direction, he began to cross the gallops.

17. As must be common knowledge and as Pat Culleton - the independent expert engineer who gave evidence on Mr Turner's behalf – accepted, a jogger running at an average pace should be able to come to a stop within, at most, a couple of seconds or a distance of no more than a few metres.

18. The gallops comprise one part of the disparate Curragh lands, collectively known as the Curragh Training Grounds, that the Minister has licensed Curragh Racecourse to use for the purpose of training racehorses. Those rolled and groomed grass gallops are located south of the Curragh Camp Armoury, starting at a point to the east of it, continuing parallel to the palisade fence on its south west side, and finishing beyond it to the west. They run in a straight line on an upward gradient in a north westerly direction for approximately seven furlongs or 1.4 kilometres. There is another gradient across the width of the gallops sloping downward away from the Army Camp. Throughout the flat racing season from approximately March to November, the gallops are open to racehorse trainers each Wednesday and Saturday, during the hours between daybreak and 1 p.m.

19. In order to ensure that racehorses and their riders take a single designated line along the gallops on any given day, cross-rails laterally intersect the gallops at three points along their length. Those cross-rails are constructed of lengths of white plastic piping supported at intervals by metal rods as stanchions. Each rod is looped around the plastic pipe and its sharpened ends are stuck in the turf below. The line that the horses must take is designated by opening a 6.6 metre gap at a corresponding point in each of the three cross-rails. As the season progresses, the location of the gap in each of the cross-rails is moved down the gradient away from the Curragh Camp, so that the designated line shifts constantly to protect the turf from damage through overuse. According to the evidence of Mr Turner and as shown in various photographs of the location taken by his partner the following day, the cross-rails were in poor condition at the time of the accident in that some of the metal rods had fallen over, with the result that certain sections of white plastic pipe were partly or wholly on the ground. Patrick Kelly, the Curragh Racecourse training grounds manager, explained during his evidence that it is quite a job to maintain the cross-rails because the sheep like to rub or scratch against them, frequently knocking them down.

20. The designated line is also demarcated by seven pairs of small white circular markers, 6.6m apart, placed at regular intervals from the start of the gallops to the finish. To facilitate military patrols around the perimeter of the Curragh Camp, there is a 20-metre gap between the northwest side of the gallops and the palisade fence on the southwest side of the Camp Armoury.

21. To the south of the gallops, running parallel to them, is a separate all-weather racehorse track.

22. Despite running on the Curragh for eight years and frequently taking a route across the gallops, Mr Turner testified that he had never seen a single horse there. Further he attributed no significance to the presence of mobile starting stalls, cross-rails and markers at that location. He thought that the stalls had been abandoned and that the cross-rails were of no use to anyone because of their poor condition. He did not notice the markers or the all-weather track that runs parallel to the gallops to the south, which he thought (wrongly, the aerial photographs would suggest) might have been obstructed from his view by trees.

23. Not far beyond the all-weather track is the southern edge of the Curragh, fringed by trainers' yards, amongst which is that of Tracey Collins.

24. On the Saturday morning of the accident, Ms Collins was working as usual from her yard at Conyngham Lodge Stables, a short distance from the gallops. Her grandfather began training racehorses there in 1926, and her father took over the operation in 1958. Ms Collins was a work rider for her father for 25 or 26 years and an amateur jockey for 10 years. She took out her trainer's licence in 2007, the year that her father died. Thus, for approaching a century, her family has been continuously engaged in racehorse training at the Curragh.

25. Ms Collins works her horses on the gallops when they are open on Wednesday and Saturday mornings. On those mornings, she begins her day by checking on their condition and then feeding them. Next, Ms Collins assigns a jockey to each mount. While the jockeys are tacking out, she drives out to inspect the condition of the ground on the gallops. That inspection usually takes place between 5.45 a.m. and 6.00 a.m. After that, Ms Collins returns to the yard to attend to various tasks; horses might be put on the mechanical walker or given a rub down. Then, the horses that are to be worked are brought down to a wooded area just to the south of the all-weather track beside the gallops, where they are trotted out for 10 minutes or so. When that has been done, Ms Collins proceeds in her jeep along the Camp Armoury side of the gallops, conducting a safety inspection to satisfy herself of the absence of any evident risk to her staff or horses from potential hazards such as vehicles, joggers or grazing sheep. She then parks her jeep at a point on the gallops beside the designated line approximately 50 metres to the west of the corner of the palisade fence. From there, Ms Collins can watch through binoculars as her horses carry out 'fast work' on the gallops and the jockeys can take direction from her as they approach her position. Ms Collins uses a circular motion of her left hand to signal the jockeys to urge on their horses and holds up the palm of her left hand in a static posture to signal the jockeys to ease them up.

26. John Watson, the independent equestrian expert who was called as a witness on behalf of Mr Turner, explained in his evidence that the training of racehorses usually entails serious work – that is, work done at a gallop – twice a week. This galloping work may be done at half speed, three-quarter speed or full speed. Generally, the last quarter of any gallop is done at full speed. The trainer adopts a vantage point that the horses will pass when they are at full exertion. As they approach the end of the gallops, the horses are pulled

up over a further 100 or 200 metres, still travelling a straight line. In Mr Watson's words, it is important to pull a racehorse up gradually because its legs are 'a fragile bit of kit', compared to its overall body mass, and because it is perhaps most prone to injury when physically tired towards the end of its exertion. When they have been pulled up, the horses are brought back around so that the trainer can observe their post-exertion condition and breathing.

27. According to the evidence of Mr Kelly, the training grounds manager, on a typical day when the gallops are open, 6 to 8 trainers would use them, working upwards of 100 horses in total.

28. At the time of the accident, Ms Collins was working a group (known as 'a lot') comprising six horses, divided into two batches of three. The horses jump off in batches and frequently ride just inches apart to simulate race conditions. It was the first batch that were involved in the accident the subject of these proceedings. Of that group, Hazel Wallace was the jockey on Daisy Bell, the horse to the right; Philip Donovan was on Majestic Queen, in the middle; and Yoshi Takamora was on Chiclet, on the left. Hazel Wallace has worked for Ms Collins for over 20 years and Ms Collins considers her to be an exceptional rider.

The accident

29. Mr Turner's evidence concerning the accident and its aftermath was broadly as follows. When he passed the corner of the palisade fence on his left, he continued running straight ahead across what he now knows to be the gallops. He was running in line with the third set of cross-rails, which were immediately to his left. He was not looking to his right or his left. Although it was a sunny morning and the sun would have been above and in line with the approaching racehorses that were below him and to his left, Mr Turner did not claim to have been unsighted in that direction; rather, his evidence was that he did not look to his right or left, as he had no reason to do so. Thus, he did not see Tracey Collins or her jeep to his right.

30. Although Mr Turner had earphones on, he stated that he first became aware of the horses when he heard them. He was insistent that he did not hear any shouting before the accident. On hearing the horses' approach, he looked to the left and saw them twenty or thirty feet away from him. They went straight over him, veering neither right nor left. Two of them may have hit him. He fell to the ground. He saw the next batch of horses coming up behind him, so he scrambled away from their line of approach before dropping to the ground again. A woman, who was probably Tracey Collins, approached him. She told him that an ambulance had been called and advised him not to move. At the time, he thought he was dying.

31. In cross-examination, it was put to Mr Turner that the account of the accident he had given in evidence was inconsistent with the case he had pleaded and the account of the accident that he had given to his own independent experts. In the personal injuries summons that issued on his behalf on 2 March 2016, the contents of which he had verified in an affidavit sworn on 7 March 2016, Mr Turner pleaded, in material part:

'While jogging along, [Mr Turner] became aware that someone was calling to him. [Mr Turner] looked around and became aware that three horses with jockeys were bearing down upon him.'

Mr Turner had no explanation to offer for that discrepancy.

32. Similarly, according to the report of Mr Culleton, Mr Turner's engineer, during an inspection of the location of the accident on 9 October 2014, Mr Turner told him that he could recall 'suddenly feeling vibration in the ground, hearing shouting and then seeing three charging horses bearing down on him from his left.' When counsel drew that account to Mr Turner's attention, he responded that he had been on a lot of medication at that time.

33. Further, according to the report of Mr Watson, the independent equestrian expert who gave evidence on behalf of Mr Turner, during an inspection of the location over two years after the accident on 1 April 2017:

'3.8. [Mr Turner] recalled looking up because he heard somebody calling to him. He was not aware what they were calling about. At the inspection, he believed the voice appeared to come from a vehicle parked about 50 metres or more away to his right.

3.9. The "next thing" he saw was "*three horses running at me with jockeys on them*". They came at him, straight through a gap in the railings, from his left.'

34. Mr Turner could not explain why, if these were errors, he had taken no steps to correct them, merely repeating several times in evidence that he had heard 'noises', but not 'shouting', just prior to the accident.

35. In her evidence, Tracey Collins gave the following account of the accident. She had driven up the gallops to inspect them for a second time at 9.10 a.m. when she had observed no joggers, sheep or vehicles present there and, thus, no risk of collision. She had parked her jeep and had alighted from it. She was observing the first batch of three horses on the gallops through her binoculars. They were gradually quickening their pace and had just come through the second set of cross-rails when the jockeys began shouting. Ms Collins put down her binoculars to look around. She saw Mr Turner running along the third set of a cross-rails on a collision course with the approaching horses. Ms Collins began running as fast as she could towards Mr Turner, while shouting and waving. The jockeys also were shouting at Mr Turner and were trying to pull up their mounts. The horses were by then going very fast. Two of them were fillies with a handicap rating of over 100. Mr Turner just kept running. Mr Turner arrived at the gap in the cross-rails, just as the horses did. He collided with the neck or shoulder of Daisy Bell, the mount of Hazel Wallace, and was knocked down. The filly stumbled, and Ms Wallace was thrown to the ground.

36. In Ms Collins view, there was nothing that the horses or their riders could have done to avoid the collision. The horses only had the 6.6-metre-wide gap to go through. At the speed they were travelling, if they had attempted to veer sharply left or right they would have fallen, creating a risk of serious injury to horse and rider. If they had veered less sharply left or right they would have gone through the cross-rails at an even greater risk of serious injury and with the additional danger that horse or rider might have been impaled on the sharpened ends of one of the metal rods supporting the plastic rails.

37. Ms Collins ran to attend to Mr Turner. She rang the army hospital at the Curragh Camp to call an ambulance. She rang Mr Kelly, the training grounds manager. Having trained in first aid, she told Mr Turner not to move. Ms Wallace was sitting up and appeared physically fine, although she seemed to Ms Collins to be in shock. Ms Collins noted loud music coming from Mr Turner's earphones, which were on the ground.

38. Hazel Wallace, who was called as a witness on behalf of the third and fourth defendants, provided the following account of the accident. She and her fellow jockeys trotted their mounts through the first marker at the commencement of the gallops because the ground there wasn't great. They started to canter and then gallop when approaching the first set of cross-rails, after which they got the horses into a tempo and went through the second set of cross-rails. They were riding together, nicely balanced and in sync. Ms Wallace was focussed on the horses beside her and on Ms Collins, who was at a vantage point about 100 yards or so beyond the third set of cross-rails. As they approached the marker between the second and third fence, Ms Wallace saw Mr Turner. He was approximately half way across the length of the cross-rails. The markers are about 150 yards from the cross rails, so she was about 150 yards from Mr Turner when she first saw him, ahead of her and to her right. She began shouting as loud as she could to warn him. The other two jockeys began shouting as well. Ms Wallace felt that he didn't hear or see them because he didn't look at them or stop.

39. Ms Wallace testified that she could not turn her horse away from the gap at that point because the turn would have been too sharp. She knew that the metal rods supporting the plastic rails have sharp spikes at each end. Their horses were trained for flat racing; they had never been taught how to jump an obstacle. It takes a furlong and a half to pull up a horse once it is moving flat out and hers was. The average racehorse weighs half a tonne. She was concerned, not only about Mr Turner's safety, but also about her own safety and that of her fellow jockeys. She was trying to pull her horse back. Unfortunately, shouting tends to have the effect of spurring a horse on, rather than slowing it down. They met at the gap at the same time. As she was going through the gap, Mr Turner came across it, colliding with her horse's shoulder. Mr Turner appeared to look up only at the last split second.

40. Ms Wallace was thrown by the force of the impact and finished up about 10 or 12 metres away, once she had stopped rolling. She saw the next batch of horses coming and scrambled away before dropping to the ground again. When the ambulance arrived, the medical staff had a quick look over her. She did not feel she required a doctor. She

spent the rest of the weekend at home and was back riding on the following Monday or Tuesday. She has been riding for 20 years and nothing like this has ever happened in her experience, either before or since.

The injuries

41. Mr Turner was brought by ambulance to the Accident and Emergency Department of Naas General Hospital, where his right shoulder was found to be dislocated. It was reduced (that is to say, put back in place) successfully, while Mr Turner was under sedative. Although he went to work the following Monday, the pain in that shoulder was very severe for six weeks after the accident and he still suffers pain and a range of physical and psychological problems that he attributes to the accident. In late 2014, Mr Turner began to develop left-sided back pain, radiating to the left side of his chest, and significant pain in the left-side of his cervical spine, radiating towards his left leg. He has undergone extensive physiotherapy. He has had injections and rhizotomy (*i.e*. nerve-cauterising or severing) procedures carried out four times, against the background of confirmed degenerative disc disease in his lumbar spine and degenerative arthritis in the facet joints there. The accident may have exacerbated an existing osteoarthritic condition in his left knee. He has been diagnosed with post-traumatic stress disorder.

Disputed facts

42. Although there is some level of agreement between the parties concerning the broad circumstances of the accident, three significant points of conflict emerged at trial: first, the distance beyond the corner of the palisade fence that Mr Turner had run before colliding with the racehorses on the gallops; second, whether there was any shouted warning to Mr Turner prior to the collision; and third, whether Ms Collins and her jeep had been present to Mr Turner's right on the gallops prior to the collision.

43. During his cross-examination at trial, Mr Turner stated that he believes the accident occurred when he had proceeded only 30 or 40 metres beyond the corner of the palisade fence. It was then put to him that in the report of Mr Culleton, the independent expert engineer instructed on his behalf, Mr Turner is recorded at the inspection on 9 October 2014 as estimating that he was 100 metres beyond the corner of that fence when the collision happened. Mr Turner responded that it would have been 100 feet (*i.e.* approximately 30 metres) and not 100 metres. Mr Turner estimated that he had been hit about eight seconds after he passed the corner and that, at the pace he was running, he would have covered 100 feet in that time. It was put to Mr Turner that it was the defendant's case that the collision had occurred 139 metres from the corner of the palisade fence. He did not accept that.

44. In the report of Tony O'Keefe, the independent expert engineer who was called as a witness on behalf of the Collins sisters, Tracey Collins is recorded as having informed him that, on the morning in question, the gap in the cross-rails (and hence the location of the accident) was at a point on the gallops that Mr O'Keefe then measured as 139 metres from the corner of the palisade fence. Mr O'Keefe confirmed his instructions and his measurements in evidence and it was not put to him that he was mistaken in either. Nor was it suggested to Ms Collins that her recollection in that regard had been incorrect. Ms

Wallace, the jockey, confirmed that the designated line that morning was the one that Ms Collins had identified to Mr O'Keefe (*i.e*. with the gap in the third-set of cross rails at a point which Mr O'Keefe measured at 139 metres from the corner of the palisade fence). Ms Wallace was not cross-examined on that aspect of her evidence. Mr Kelly, the training grounds manager, who was directly called to the scene of the accident by Ms Collins, gave evidence that the location at which it occurred (the gap in the third set of cross-rails) was about 120 metres from the palisade fence.

45. Bearing in mind the uncontroverted evidence that the season commences in March or April and that the accident occurred in September, the defendants' evidence on the point is consistent with the unchallenged assertion that, as the season progresses, the designated line on the gallops is moved down the gradient, ever further from the palisade fence at the Camp Armoury.

46. I have already described the conflict between Mr Turner's evidence at trial – that there had been noises, but no shouts, prior to the collision – and not only the defendants' evidence on that point but also both the relevant part of Mr Turner's claim as pleaded and the description of events that he gave to his own independent experts as recorded by them.

47. In evidence at trial, Mr Turner claimed never to have looked left or right while running on the Curragh because, in his view, there was no reason to do so. Nonetheless, he did not accept that Ms Collins' jeep was parked on the gallops to his right when the accident occurred. Instead, he expressed the view that the jeep had driven up after the accident.

48. As noted earlier, the evidence of Ms Collins is that she had parked her jeep at a vantage point on the gallops that would have been to Mr Turner's right as he proceeded beyond the corner of the palisade fence and was standing beside it, watching through her binoculars the horses proceeding towards her. That is also the evidence of Ms Wallace, the jockey. Once again, Mr Turner's own independent equestrian expert, Mr Watson, records Mr Turner describing a voice calling to him prior to the collision that 'appeared to come from a vehicle parked about 50 metres or more away to his right.'

49. Having considered the evidence as carefully as I am able, on the balance of probabilities I am conclude that:

    (a) the accident occurred between 120 and 139 metres from the corner of the palisade fence,

    (b) for several seconds prior to the accident, the jockeys of the three approaching horses to Mr Turner's left were shouting warnings at him and Ms Collins to his right was running towards him, while waving her arms and shouting a warning to him, and

(c) as the preceding finding implies, Ms Collins jeep was parked at a position on the gallops where it would have been plainly visible to Mr Turner's right, as would Ms Collins.

Analysis

i. negligence

50. Mr Watson, the equestrian expert instructed on behalf of Mr Turner, expressed the view that the Curragh Racecourse could, and should, have averted the accident by erecting a temporary sign when the gallops were in use, somewhere in the vicinity of the corner of the palisade fence at the Camp Armoury or, better still, at the top of the third set of cross-rails, orientated to be read by persons approaching the gallops at that point from the north east, reading 'LOOK LEFT FOR GALLOPING HORSES' or words to that effect. Mr Culleton, Mr Turner's expert engineer, also expressed, albeit in more general terms, the view that a sign of some sort should have been erected. As that was not done, Mr Turner submits that Curragh Racecourse breached the duty of care that it owed him.

51. I cannot accept that submission for several reasons.

52. The first reason is that I cannot reconcile it with the particular facts of this case. From the moment that Mr Turner passed the corner of the palisade fence around the Camp Armoury, the entire unobstructed vista of the gallops opened out before him. Tom Rowan, the independent expert engineer called as a witness by Curragh Racecourse, gave unchallenged evidence that, at a running speed of 3.05 m/s (a good average speed for a jogger), it would take between 32 and 45 seconds to run a distance of between 100 and 139m. On his own evidence, Mr Turner proceeded for that long over that distance across an open plain without ever seeing, to his left, the six galloping racehorses and their jockeys, whose course was converging orthogonally with his own, or seeing, to his right, Ms Collins, who was initially standing beside her parked jeep, which he also failed to see, and who then ran towards him, shouting and waving her arms. As already noted, Mr Turner's explanation for this remarkable turn of events is that he did not look to his right or his left when jogging on the Curragh Plain because as far as he was concerned there was no reason to. That being so, I cannot be satisfied that Mr Turner would have seen a temporary sign erected at either the corner of the palisade fence or the beginning of the third set of cross-rails to either the left or right of the route along which he had chosen to jog. Hence, even if the duty of care on Curragh Racecourse required it to erect a temporary warning sign, I could not be satisfied that its failure to do so was the cause of Mr Turner's accident.

53. The second reason is that I cannot accept the existence of a duty of care as wide as that which Mr Turner's submission implies. In his report on behalf of Mr Turner, Mr Watson acknowledges that it is a corollary of the view he has expressed that equivalent signage would be required at other (unspecified) locations on the Curragh Plain. While some attempt was made in evidence by, and on behalf of, Mr Turner to suggest that there are a limited number of points at which recreational walkers or joggers are likely to commence traversing the gallops, I accept the evidence of Mr Kelly, the training grounds manager,

that the gallops are an open plain, accessible at any point around the three hundred and sixty degrees of their circumference and that recreational users cross them in all directions. That proposition is borne out by the photographic evidence. While it is true that a number of faint tracks, which Mr Kelly identified (correctly, to my mind) as sheep tracks and which Mr Turner referred to as jogger's paths, are evident in various aerial and other photographs, those tracks traverse the gallops at a range of different angles and there is nothing to compel walkers, joggers or, for that matter, sheep to use, or stay on, any of them.

54. Where, then, would a duty to erect signs to warn persons traversing the open gallops of the possible presence of galloping horses begin and end? The Supreme Court addressed a similar question in *Weir-Rodgers v S.F. Trust Ltd.* [2005] 1 I.R. 47. A woman admiring a sunset with some friends from a vantage point at Coolmore, beside the beautiful Rossnowlagh Beach in County Donegal, lost her footing and slipped down a deceptively steep gradient into the sea, sustaining significant physical injuries. She sued the defendant company, formed by the Franciscan religious order, which was the occupier of the land on which she had been standing. Her claim was that the company had been in breach of its duty to her under the Occupiers' Liability Act 1995 ('the Act of 1995') in failing to erect a sign or notice warning of the danger. In giving judgment for the Court, Geoghegan J (Murray CJ and Denham J concurring) commented (at 53):

> 'At one point in the cross-examination of Mr McMullan [the plaintiff's independent expert engineer], counsel for the defendant asked him if you were to put up a notice everywhere there was a ridge or a cliff how many notices would have to be erected. His answer was that the place would be littered with notices. One does not have to be an engineer to agree with that answer and one does not have to be blessed with a high degree of common sense to opine that it is highly unlikely the Oireachtas ever intended any such thing. Mr McMullan's evidence was extreme but, in my view, it logically had to be given to support the case for the plaintiff. For instance, in re-examination counsel for the plaintiff referred to a question counsel for the defendant had asked Mr. McMullan as to whether he was suggesting that every stretch of the coast line should be fenced. I rather suspect that counsel for the plaintiff was hoping for a different kind of answer than he got. Mr. McMullan said that any area that is heavily pedestrianised should certainly have some warning signs and that there should also be a fence there as well. I must confess that this conjures up in my mind huge areas of coastline right around Ireland fenced against the public and littered with warning notices. An intention of the Oireachtas to that effect would seem unlikely but if a statute required it, the courts would be bound to uphold it. That is the question which I have to address when I deal with the law.'

55. In dealing with the law, Geoghegan J concluded (at 56) that, even if the duty of the occupier in that case was the ordinary *Donoghue v Stevenson* [1932] A.C. 562 neighbourly duty of care and not the lower duty not to cause intentional injury to, or act

with reckless disregard for, a recreational user or trespasser under s. 4(1) of the Act of 1995, the plaintiff would not be entitled to succeed. Geoghegan J explained (at 57):

‘14 …The whole area of reasonableness in an outdoor land situation has been quite recently considered by the House of Lords in *Tomlinson v. Congleton Borough Council* [2003] UKHL 47, [2004] A.C. 46. That case involved potential liability under the English Occupiers Liability Act 1957 and there were some views expressed in the speeches of the Law Lords relating also to the Occupiers Liability Act 1984 which was the Act dealing with duty to trespassers. While there is some overlap, the wording of the English Acts is sufficiently different to render it of limited assistance in interpreting the Irish legislation. But at least one aspect of that case is relevant to this case. The Law Lords in their speeches referred to the common sense expectations of persons engaged in outdoor activities such as, for instance, mountain climbing or walking or swimming in dangerous areas. The other side of that coin is that the occupier is entitled to assume that knowledge of such dangers and risks would exist and safety measures would be taken. For this purpose, I find it sufficient to refer only to some passages from the speech of Lord Hutton. At para. 57 he cited with approval a Scottish case *Stevenson v. Corporation of Glasgow* 1908, SC 1034 at p. 1039 where Lord M'Laren stated: -

> "in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures. The situation of a town on the banks of a river is a familiar feature; and whether the stream be sluggish like the Clyde at Glasgow, or swift and variable like the Ness at Inverness, or the Tay at Perth, there is always danger to the individual who may be so unfortunate as to fall into the stream. But in none of these places has it been found necessary to fence the river to prevent children or careless persons from falling into the water. Now, as the common law is just the formal statement of the results and conclusions of the common sense of mankind, I come without difficulty to the conclusion that precautions which have been rejected by common sense as unnecessary and inconvenient are not required by the law."

15 That passage would seem to be apposite to this case also and would seem to apply to any suggestion that a warning notice should have been put up. Lord Hutton also cites *Glasgow Corporation v. Taylor* [1922] 1 A.C. 44, where at p. 61 Lord Shaw of Dunfermline stated: -

> "Grounds thrown open by a municipality to the public may contain objects of natural beauty, say precipitous cliffs or the banks of streams, the dangers of the resort to which are plain."

16 In support of these propositions, Lord Hutton cited yet another Scottish case *Hastie v. Magistrates of Edinburgh* 1907, SC 1102 where the Lord President (Lord Dunedin) at p. 1106 said that there are certain risks against which the law in

accordance with the dictates of common sense, does not give protection - such risks are "just one of the results of the world as we find it."

17 I would heartily endorse the sentiments expressed in these passages. The person sitting down near a cliff must be prepared for oddities in the cliff's structure or in the structure of the ground adjacent to the cliff and he or she assumes the inherent risks associated therewith. There could, of course, be something quite exceptionally unusual and dangerous in the state of a particular piece of ground which would impose a duty on the occupier the effect of which would be that if he did not put up a warning notice he would be treated as having reckless disregard. But this is certainly not such a case. While obviously sympathetic to the plaintiff in her serious injuries, I am quite satisfied that there was no liability on the part of the defendant in this case and I would set aside the judgment of the High Court and dismiss the action.'

56. In my view, the dangers inherent in crossing wide open gallops are directly comparable to those of visiting precipitous cliffs or the banks of rivers and streams. I fully accept that there could be something quite exceptionally unusual and dangerous in the state of the gallops that would impose the duty to erect a warning sign. In the course of argument, I offered as an example the hypothetical that if the gallops extended up to the side of the palisade fence of the Camp Armoury and if the designated line was then too close to that fence, creating a blind corner for persons emerging onto the gallops from the north west side of the camp, then such an exceptional or unusual danger could well exist and a duty to erect a warning sign or to take some comparable preventative measure at that specific place could then arise. But this was not such a case. There was nothing deceptive about the presence of the galloping racehorses nor about their progress up the gallops. It was the unchallenged evidence of Mr O'Keefe, Ms Collins' independent expert engineer, that, when Mr Turner passed the corner of the palisade fence, the racehorses would have been plainly visible below him on the open plain of the gallops from an initial distance greater than 750 metres away to the point of the collision between them over thirty seconds later. I draw support for that conclusion from the evidence of Mr Kelly, the training grounds manager, that, in his 21 years in that role, no other such incident has occurred, either before or since Mr Turner's accident, and from that of Ms Wallace, the jockey, that nothing like it had ever happened in the twenty years she had been riding on the gallops for Ms Collins.

57. Hence, Mr Turner has failed to satisfy me that Curragh Racecourse was under a duty of care to erect a warning sign at, or near, the point on the Curragh Plain at which he commenced jogging across the gallops.

58. In light of that conclusion, it is unnecessary to consider Mr Turner's additional argument, which assumed the existence of such a duty, that Curragh Racecourse was not prevented from erecting a warning sign by the express term of its covenant with the Minister under the licence of 1968 not to erect any 'structure' on the gallops without the Minister's

written permission, since a warning sign should not be considered a structure within the meaning of that term of the agreement, properly construed.

59. I reject the view put forward by Mr Culleton, Mr Turner's engineer, that the Curragh Racecourse was in breach of duty in failing to cordon off either the entire gallops or the designated line on the gallops in circumstances where: first, there was no evidence that it was practicable; and second, there was uncontroverted evidence that Curragh Racecourse had no lawful entitlement to do so.

60. Finally, on the question of breach of duty, I also reject Mr Culleton's view that the Collins sisters were negligent in failing to ensure that the horses Tracey Collins was training on the gallops were pulled up before Mr Turner could collide with them. Mr Culleton is not an equestrian expert. Mr Watson, Mr Turner's equestrian expert, expressed no such view and I accept the evidence of Ms Collins and Ms Wallace on that point.

61. Hence, I conclude that there was no breach by any of the defendants of any duty of care owed to Mr Turner in the circumstances of the accident.

ii. was Mr Turner negligent?

62. Mr Turner jogged over 120 metres across an open plain for over thirty seconds before running into the shoulder or neck of one of three galloping racehorses with which he had been on an orthogonal collision course for all of that distance and time. Had he been keeping a proper - or any – lookout, he would have been able to stop within a second or two or within a distance of less than six metres and the collision could have been avoided.

63. Mr Turner candidly admitted in evidence that he did not look to his left or right at any time prior to the collision because, in his view, he had no reason to do so. He did not see in his peripheral vision the racehorses that he was converging with, nor did he hear the thunderous sound of those horses' hooves, until it was too late.

64. Mr Turner testified that he considered running on the Curragh Plains directly comparable to running across a field, before offering the view that, since there is no necessity to look left or right when crossing a field, there was no necessity for him to look left or right (or otherwise keep any proper lookout) when crossing the gallops prior to this accident. I cannot agree with that view for three reasons.

65. First, given the potential presence in any field of livestock, wild animals, agricultural vehicles and machinery, farmers, agricultural workers and visitors, it seems to me sensible and, thus, reasonable to keep a proper lookout when crossing one. Second, the Curragh Plains are more than just a very large field. On the Curragh, there will also be military patrols; the management and conservation activities of the *Maor* and his (or her) staff; and the racehorse training activities that have been going on there for centuries. Third, the whole purpose of keeping a proper lookout is to afford an opportunity to become aware of, and take appropriate measures to deal with, the unexpected, as well as the predictable. It is for that reason that I do not think anything very much turns on Mr

Turner's claim to have been ignorant of the nature and purpose of the gallops when he began crossing them.

66. In his evidence, Mr Turner contrasted the proper lookout he keeps when crossing a public roadway with, to borrow a horse racing expression, the blinkers that he asserts he is entitled to wear, figuratively speaking, when running on the Curragh. Once again, I am afraid that I cannot agree. The existence of a legal requirement to keep a proper lookout when crossing a public road does not imply the absence of any common-sense requirement to do so in other public places.

67. While listening to music through headphones as a pedestrian or jogger in a public place does not amount to negligent conduct in and of itself and has to be considered in context, I am satisfied that it did contribute to the accident in this case. In addition to failing to keep a proper visual lookout, Mr Turner did not hear the sound of the warning shouts of Ms Collins, the trainer, and of the jockeys of the three galloping racehorses. Nor did he hear the sound of the galloping hooves of the approaching horses.

68. In arguing that listening to music on earphones cannot be classified as negligent on his part, Mr Turner relies on the decision of the Supreme Court of the Australian Capital Territory in *Pangallo v Smith* [2015] ACTSC 313. While I have found the decision of Associate Justice Mossop in that case lucid and persuasive on the relevant point, it does not assist Mr Turner. The case concerned a collision on a suburban street between a motor vehicle and a pedestrian wearing earphones and listening to music. In contrast to the present case, the breach of duty of the defendant in that case (the motorist) was admitted, and the relevant issue was whether there had been contributory negligence on the part of the plaintiff pedestrian in 'wearing earphones and listening to music whilst walking on the road ... thus impacting upon his ability to hear approaching traffic.'

69. Mossop AsJ stated (at para. 20):

> 'A pedestrian crossing a road at night even in a relatively low traffic suburban area is obliged to take care for the person's own safety. That obligation extends to looking and listening for vehicles on the road that have the potential to cause harm to the pedestrian. It extends to cars approaching from both in front of and behind the pedestrian. It extends to circumstances in which the road is reasonably lit. It is clear that the plaintiff neither saw nor heard the first defendant's vehicle prior to the accident. In my view had the plaintiff been taking reasonable care either by paying greater visual attention to his surroundings or by ensuring that his hearing was not impeded by headphones and the sounds of the radio then it is likely that he would have become aware of the presence of the first defendant's vehicle and its approach as it turned into Jandamarra Street. It is more likely than not that having regard to his proximity to the edge of the road that he would have been able to take some evasive measure in order to avoid the accident.'

70. I conclude that the proximate cause of the accident was Mr Turner's failure to keep a proper lookout, together with his use of earphones to listen to music, impeding – if not

eliminating - his ability to hear the approach of the racehorses or the shouted warnings of their approach. It is more than likely that, had he been taking reasonable care either by keeping a proper lookout or by ensuring that he was in a position to hear the sound of the approaching racehorses or the shouted warnings of their approach, he could have avoided the accident by the simple and straightforward expedient of stopping or slowing down.

iii. occupiers' liability

71. Mr Turner pleads that Curragh Racecourse was in breach of its duty of care towards him under the Act of 1995. However, in view of the finding I have already made that none of the defendants were in breach of any duty of care that they owed to Mr Turner, there is nothing in the Act of 1995 that can avail him. Even assuming, without deciding, that Curragh Racecourse was an 'occupier' of the gallops, as defined under s. 1 of that Act, then Mr Turner would be no more than 'a recreational user' there, as defined under the same section. Thus, under s. 4 of the same Act, Curragh Racecourse would have owed Mr Turner only the lesser duty not to injure him intentionally or act in reckless disregard of his interests. In those circumstances, Mr Turner might have been expected to argue that the 'danger' concerned (that of a collision with a racehorse on the gallops) was not a 'danger due to the state of the premises', thus taking his claim outside the scope of the Act of 1995 and back within the rubric of normal negligence rules; see *Allen v Trabolgan Holiday Centre Ltd* (Unreported, High Court (Charleton J), 30 April 2010), [2010] IEHC 129 (at para. 1). Yet, as I have already concluded, even under normal negligence principles, his claim cannot succeed.

iv. a claim in public and private nuisance that was not pleaded

72. In the written legal submissions filed on his behalf at the end of the trial, Mr Turner sought to introduce a new claim of occupiers' liability against the Collins sisters and new claims of private or public nuisance against each of the defendants. I have already explained why an occupiers' liability claim could not succeed. A public nuisance claim could not succeed either because, on the facts I have found, none of the defendants unreasonably interfered with the exercise by Mr Turner, as a member of the public, of any right associated with the use of the Curragh Plain. Whether Mr Turner unreasonably interfered with the defendants' exercise of such rights is a matter that – perhaps fortunately for him – does not arise. The proposed claim in private nuisance is untenable; it depends on the faintly surreal proposition that the right to jog on the Curragh is a local customary right *i.e*. one confined to members of the local community and not available to the public at large.

73. However, an antecedent difficulty for Mr Turner is that he did not plead any of the claims just described; did not formally apply to amend his pleadings to include them; and did not offer any explanation for his failure to adopt either course. Instead, he argued in closing submissions, when first raising those claims, that their informal introduction at that point would not prejudice the defendants because, if they weren't prepared to deal with them on the hoof (to borrow another equine expression), they could apply for an adjournment. While it is clear that Order 28, rule 1 of the Rules of the Superior Courts - the rule

governing the exercise of the power to permit the amendment of pleadings - is intended to be a liberal one (*i.e.* to allow any amendment necessary for the purpose of determining the real questions in controversy between the parties), in my judgment the exercise of that power in the manner and circumstances just described would facilitate an abuse of process and would amount to a breach of the defendants' fair trial rights. Hence, I do not propose to do so.

Conclusion

74. While Mr Turner is entitled to every sympathy for the injuries he has sustained and the pain and suffering he has endured, I can find no responsibility and, hence, no liability for those injuries on the part of any of the defendants.

75. Mr Turner's action is dismissed.