[2024] IEHC 405

RECORD NUMBER 2020 7676 P

HIGH COURT

PERSONAL INJURIES

BETWEEN

BREDA LONG

Plaintiff

-AND-

TIPPERARY COUNTY COUNCIL

Defendant

EX TEMPORE JUDGMENT of Ms. Justice Nuala Jackson delivered on the 10th of June 2024

INTRODUCTION

1. There is no doubt that the Plaintiff in this matter suffered serious and persistent personal injuries arising from the events of the 16th November 2018. I found the Plaintiff to be a most honest witness and her account of the events of that date was clear, albeit that she was undoubtedly in very considerable pain in the immediate aftermath of her fall and I have no doubt that her focus at that time was, understandably, upon pain management and absorbing the shock and distress which must have accompanied her fall. It is clear that the Plaintiff was walking family pets on a stretch of footpath which was well known to her when she was caused to slip or trip, falling out into the road. She sustained injury to her right shoulder, left wrist and to her head, resulting in her removal to hospital by ambulance and her treatment necessitated a five day in-patient stay in hospital together with ongoing treatment thereafter.

2. Fortunately, her head injury was not serious although it did result in scarring. Her injury to her wrist has largely resolved. Her shoulder injury has proved to be more persistent

and continues to this day. She demonstrated to me the current restriction in movement of her right shoulder and it would appear that full resolution of this injury is unlikely. There can be no doubt that the Plaintiff was properly attired for these activities, her evidence being that she was wearing runners. The issue for me, however, all of the above evidence being largely uncontradicted, is what caused the Plaintiff to fall and is such cause such as renders the Defendant liable, in law, to compensate the Plaintiff for the sequelae thereof?

THE EVIDENCE

3. It is regrettable that the evidence in relation to the cause of the fall is much less satisfactory and much less clear than the evidence relating to the event itself. It is undoubtedly the case that there were leaves on the footpath. It is my clear view from the evidence that the leaves in question were wet (a likelihood in the context of a November afternoon in Ireland). However, the issue is whether the presence of the leaves on the pavement upon which the Plaintiff slipped is something for which the Defendant is liable?

4. The evidence of the Plaintiff was that there was "a slope on the footpath, that it sloped into a depression. The photographic evidence showed that there had been works to the pavement since the date of the accident which works the Defendant's Counsel informed me had been carried out in or about 2019. Therefore, the only evidence in relation to the condition and design of the footpath at the date of the accident is derived from a Google photograph from 2009. It is common case that the condition and construction of the footpath at the time of the events the subject of these proceedings was most likely very similar to that shown in this photograph. This supports the Plaintiff's evidence of there being a slope on the footpath as there was a dishing of the pavement around the point of the fall in ease of moving from the footpath to the road for wheelchairs, buggies and the like. The Plaintiff stated that there were leaves at the edge of the footpath and that there was mud under the leaves and she slipped on this detritus. The Plaintiff's case is very clearly pleaded, Particulars of Negligence stating at Paragraph 4(e) that:

"(e) Provided for a sloped surface on the footpath and/or failed to properly design and/or repair the footpath thereby allowing water and leaves to accumulate and present a danger to pedestrians;"

The Plaintiff gave evidence of the presence of leaves and that she was familiar with the area in question and that she had seen leaves previously at the locus of the accident. Under cross-examination, the Plaintiff stated that whatever caused her to fall was on the footpath. She indicated that she slipped on wet leaves and on whatever was under these leaves. It was robustly put to her that this evidence varied from the contemporaneous note of her conversation with ambulance personnel. This note indicated that the Plaintiff said that she had "tripped over the kerb". She acknowledged that this was different to her evidence but she said that she had tripped over the kerb because she slipped on leaves. I do not form the view that much turns on this evidence. Clearly, the Plaintiff was in considerable pain, distress and discomfort. I believe that it is perfectly plausible that she would inform the paramedics in these circumstances that she had tripped without going into the further detail of what caused her to slip. Therefore, I accept that the Plaintiff tripped and fell off the pavement due to slipping on leaves and associated detritus.

5. The Plaintiff called as a witness a retired member of An Garda Siochana who resided locally and had come upon the scene shortly after the fall; the Plaintiff was lying partly on the road and partly on the footpath at the time he arrived. Being a local resident, the witness was extremely familiar with the locus. In his evidence, he referenced the poor physical state of the footpath, referencing pitting and cracks and plaster and concrete being missing. He indicated that the surface of the footpath was wet on the date in question and that leaves do gather at that point. His evidence is that he noticed leaves on the footpath and kerb, where they meet the road. He said that he did not notice anything under the leaves. His evidence was that he had previously observed leaves at this place and this was regular in wintertime when conditions were damp.

6. The expert engineering evidence called by the Plaintiff was most useful and honest. His evidence was that the Plaintiff told him she had slipped on leaves on the footpath. He referenced the fact that leaves break down when wet. He referenced the

dropping/dishing of the kerb and stated that this was a common feature in ease of road crossing. He stated that there was sloping from the fence at the interior of the footpath to the road. There would be a camber in the road itself causing the road to fall to either side to allow water to run off the road surface. He very fairly indicated that he could not measure how the road was at the time because it was now completely different in structure due to the subsequent works. However, he opined that there could be a design fault in relation to the design of the road and the design of the footpath which, together, could lead to ponding as a result of a low point at the outside edge of the footpath where it dropped. His evidence was that you could have ponding of water which over time would lead to a build up of silt in the area which would become slippery in wet weather. It is important to note, however, that there was no evidence from the Plaintiff or the contemporaneous witness of any water ponding in the area. There was no evidence of silt having been created at the edge of the road as a result of such ponding or of silt having progressed onto the footpath. Mr. Morgan, the engineer, indicated that this ponding and silt build up could have occurred and if it did that it could have been due to a design fault of the combination of the road and the footpath. Importantly, his evidence was not that this had occurred but merely that it was a possibility. It is important to remember that the third party witness's evidence was that he did not notice anything under the leaves. I am of the view that ponding of the nature referenced by the Plaintiff's engineer would have been evident.

7. There was further supposition that a row of stones/pebbles under the fence at the inside edge of the footpath might have had a drainage purpose. Yet again, there was no evidence that this was the reason for this feature. The Defendant's engineer opined that these stones might have been in ease of the homeowner whose property was guarded by the fine in question, reducing weeds and such like. I cannot accept that these stones/pebbles were linked to drainage absent evidence that this was the case which evidence I consider would have been easily obtained in the context of professional inspection. The Plaintiff's engineer fairly stated that this evidence was by way of "surmise".

8. The Plaintiff's case effectively asks me to surmise that the carrying out of works to the pavement may have been in order to cure a defect due to ponding. The Defendant's engineer says that this was a footpath of circa 50 years in existence and that repair/reinstatement would be perfectly normal with the worst parts of the pavement being addressed as priority. None of this evidence can cure the deficiency which arises from the fact that there was no evidence of water ponding at the locus at the time of the accident. Indeed, the engineer fairly stated that he "can't say if this is the case". The reference by the Plaintiff to 'mud', it appears to me, most likely relates to the breaking down of wet leaves evidenced by the Plaintiff's expert engineer.

9. In cross-examination, the expert engineer for the Plaintiff accepted that leaves do accumulate and local authorities periodically carry out cleaning operations. He accepted that it would be unreasonable to expect such cleaning to be done on a weekly basis. He accepted that leaves on the footpath are something which requires a pedestrian to take usual care and that this was something that was encountered by all pedestrians in the autumn time. When asked if he could definitively tell the court that there was a design issue with the footpath/road in this instance, he answered that he was only surmising "because we don't have any information from council."

10. The expert engineer for the Defendant stated that it was his opinion that there was no design defect; that the road and dished footpath were perfectly normal and acceptable from a design perspective.

DISCOVERY AND EVIDENCE

11. The Plaintiff's expert engineer indicated that he was a bit in the dark as to why the works in 2019 had been carried out. Discovery had been sought from the Defendant in relation to these works and an Affidavit of Discovery was sworn. However, the documentation discovered was scant in nature consisting only of a Google map (slightly different to that of the Plaintiff being from a slightly different position on the road). The Plaintiff's evidence (from her expert) was that there would normally be some kind of plans for this type of work.

12. I entirely agree with this. However, I cannot make up or bolster evidence from a mere assertion that discovery appears scant in circumstances in which no challenge was made to the discovery pre-trial whether by way of an application for further and better discovery or motion asserting failure to comply with discovery obligations.

13. It was indicated that I should be sceptical of the evidence of the Defendant's expert engineer due to confusion in his evidence as to the assertions which had been clearly pleaded by the Plaintiff. There is no doubt that there was a confusion at the start of this engineer's testimony in this regard in circumstances in which the case as pleaded by the Plaintiff is very clear (as referenced above) and entirely corresponds with the case made at hearing. However, I do not conclude that, having regard to the totality of the evidence before me, much turns on this. The evidence of the engineering expert for the Defendant was clear that it was his view that there was no defective design in the road and that the events occurred due to wet leaves being on the footpath and not due to any fault on the part of the Defendant or any defective actions or interventions made by the Defendant.

14. It was further submitted to me that I should take cognisance of the fact that the Defendant had not called any evidence other than the expert engineering evidence and that a listed witness had not in fact been called at hearing although in court. I do not believe it is possible or in any manner appropriate for me to have regard to evidence which was not in fact called. It is for each party to call such evidence as they consider appropriate and I cannot surmise a position on the basis of possible evidence of witnesses not called at the hearing herein.

STANDARD AND BURDEN OF PROOF

15. The onus is on the Plaintiff to prove her case on the balance of probabilities. This is a well established principle of law and I would refer to the *dictum* of Henchy J. in **Banco Ambrosiano SPA v. Ansbacher Company** [1987] ILRM 669:

"The normal rule in a civil case is that the person on whom lies the onus of proving a particular averment is held to have discharged that onus if the court is satisfied on the balance of probabilities that the averment in question is correct."

THE LAW

16. McMahon and Binchy, Law of Torts (4th Ed)(2013) states:

*"**[24.123]** It is well established that, whereas a highway authority may be liable for misfeasance, that is, acts of positively negligent character regarding the maintenance or repair of the highway, it will not be liable for non-feasance, that is, the failure to maintain the highway, however negligent that failure may have been.*

***[24.124]** It has been noted by Kingsmill Moore J that "[t]his may be an unsatisfactory state of the law, but law it is," and in a Supreme Court decision of 1925, the rule was described as "anomalous".*

***[24.125]** Judges continue to examine the rule. In Condon v Cork Corporation, in 1996, Moriarty J observed that:*

"the present state of our substantive law with regard to misfeasance and non-feasance is artificial and outmoded. And indeed it can sometimes provide an incentive to a road authority to lack diligence and to allow hazards to accumulate with wear and tear but nonetheless it remains the law of the land.""

17. I have been referred to the decision of the Court of Appeal (Noonan J.) in **O'Riordan v. Clare County Council and Another** [2021] IECA 267. The kernel of this case is reflected in the *dictum* in paragraph 1 of that decision:

"Liability for dangers on the highway has been the subject of litigation for centuries. It has given rise to the well-known and long settled distinction between misfeasance and non-feasance. In cases of the former, the highway authority may be liable, but in the latter, it is not."

18. I have considered the detailed analysis of non-feasance and misfeasance contained in this judgment at paragraphs 19ff. I have had regard, in particular, to paragraph 25 which states:

> *"25. In Gallagher v Leitrim County Council [1955] 89 ILTR 151, the non-feasance principles was restated by Kingsmill Moore J.:-*
>
> > *"The principle is that the local highway authorities are not liable for leaving public roads or footpaths in improper repair; they are not liable for failing to take steps to restore these roads or footpaths to a proper state of repair. If, however, they do anything and do it in such a way as to create a danger they are liable."*

19. I was also referred by Counsel for the Plaintiff to the *dictum* of Lord Hoffman in **Gorringe v. Calderdale Metropolitan Borough Council** [2004] 1 WLR 1057 (paragraph 13) (recited at paragraph 26 of the judgment of Noonan J.):

> *"13. ... An individual who had suffered damager because of some positive act which the authority had done to make the highway more dangerous could sue for negligence or public nuisance in the same way as he could sue anyone else. The highway authority had no exemption from ordinary liability in tort. But the duty to take active steps to keep the highway in repair was special to the highway authority and was not a private law duty owed to any individual. Thus it was said that the highway authorities were liable in tort for misfeasance but not for non-feasance. Sometimes it was said that the highway authority was 'exempt' from liability for nonfeasance, but it was not truly an exemption in the sense that the authority had a special defence against liability. The true position was that no one had ever been liable in private law for non-repair of a highway ...""*

20. This was most recently considered by O'Higgins J. in **Best v. South Dublin County Council** [2024] IEHC 243 where he stated:

> *"20. It is fair to say the non-feasance rule has come in for some criticism over the years. In O'Brien v. Waterford County Council [1926] IR 1 per Murnaghan*

J. it was described as "anomalous". In Kelly v. Mayo County Council [1964] IR 315 per Kingsmill Moore J. it was described as "unsatisfactory". In McCabe v. South Dublin County Council [2014] IEHC 529 Hogan J. commented on the "illogical distinction" between non-feasance and misfeasance, describing the rule as "blunt and indiscriminate" and that nobody could say it "sits easily with general principles of tort law".

21. In O'Riordan v. Clare County Council [2021] IECA 267, the Court of Appeal acknowledged these criticisms but stated that the rule was so firmly entrenched in Irish law that nothing short of statutory intervention could dislodge it. Noonan J. noted that the rule has been abolished in the United Kingdom and that in Ireland as long ago as 1961, the Oireachtas legislated to remove it. However, 60(1) of the Civil Liability Act 1961 has never been commenced by Ministerial Order. In fact, s 2(3) of the Roads Act 1993 appears to preserve the immunity."

APPLICATION OF LAW TO FACTS

21. Referencing Kingsmill Moore J. recited above, has the Plaintiff proved to the required standard that the Defendant here did something and has it so acted in such a way as to create a danger? It is clear that, commencing many years ago, the Defendant has instated the road and footpath. It has done so in a manner that causes water to flow to the point where the road meets the footpath. Mr. O'Reilly says that this is normal and usual practice. Mr. Morgan's evidence is that such construction would be faultily designed <u>if</u> it resulted in ponding to occur such that would cause silt to accumulate which, together with wet leaves, would constitute a danger. I take no issue with this proposition. However, I cannot accept that the evidence supports such being the situation here. There is simply no evidence of ponding but rather evidence of leaves on the footpath which, due to the season concerned, were wet. I cannot, on the evidence before me, find that the Defendant created a danger.

CONCLUSION

22. Unfortunately, accidents happen and sometimes with serious consequences. This is such an occasion. However, for a defendant to be liable, there must be fault on their part such as the law has deemed appropriate for the allocation of blame. This is not such a case. Therefore, I must find in favour of the defendant. On the evidence before me, this is a clear case of non-feasance rather than misfeasance.