

**THE HIGH COURT
[2015 NO. 5689 P.]**

BETWEEN

LAURENCE FALVEY

PLAINTIFF

AND

LIMERICK COUNTY COUNCIL

DEFENDANT

Judgement of Mr. Justice Bernard J. Barton made on the 31st day of October, 2019

Introduction

1. These proceedings arise as a result of an accident which occurred on the 12th April, 2013, when the Plaintiff tripped and fell on the public footpath of a slip road proximate to its junction with the N21, Newcastle West, Co. Limerick. A full defence was delivered to the claim, incorporating a plea of non-feasance and contributory negligence; liability for the accident was fully in issue.

The Accident Locus

2. The Defendant is the highway authority responsible for the public roads and footpaths in the county area of Co. Limerick. The footpath *in quo* was designed, laid out and constructed by the Defendant in or about 2001. The pavement was formed in one piece of poured concrete bounded by kerbstones. In 2014, subsequent to the accident, the footpath was replaced by a jointed concrete pavement into which, proximate to the slip road junction, studs had been inserted for the assistance of visually impaired pedestrians.
3. Mr Vallely, the Defendant's county engineer, gave evidence that in the event of cracking occurring in the pavement as a result of settling or traffic crossing it the jointing construction employed in the construction of the new footpath inhibits the subsequent development of deformation in the concrete surface of the pavement. The accident occurred on the footpath closest to left turning traffic at the mouth of the junction between the slip road and the N21. In order to facilitate traffic turning into or out of the slip road the footpath on either side was designed and laid out so as to bend away on approach to the junction, the mouth of which was measured at six metres. The usable width of the slip road available to traffic approaching the junction could be restricted by the intermittent parking of vehicles.
4. Subsequent to construction works carried out in 2001, which included the footpaths, a series of substantial cracks gradually formed in the pavement surface at the accident locus. One crack extended across the entire width of the pavement and over time deformed along approximately 50% of its length creating an elevated concrete lip which the Defendant accepted constituted a tripping hazard to pedestrians approaching the junction; the elevated lip was measured at 30 millimetres in height. The damage to the footpath was caused by heavy goods vehicles (HGV's) mounting the pavement in the course of turning left from the slip road onto the N21.

The Plaintiff

5. The Plaintiff was born on the 5th September, 1964 and resides at 7 Castlevue, Newcastle West, Co. Limerick. He has three grown up children and is a painter/decorator by

occupation. Except for some relatively confined and intermittent painting work the Plaintiff's capacity to engage in his occupation was significantly restricted due to a serious left knee injury sustained in or about 2001, when he fell from a ladder. Since that accident he has been in receipt of disability payments from the Department of Social Protection. Following a diagnosis in 2011, that he wife had terminal cancer he gave up what limited work he was undertaking to become his wife's carer; she died in 2015. The Plaintiff has not returned to any form of remunerative work since and remains in receipt of social welfare payments paid to him in respect of physical disability resulting from the 2001 accident.

Accident Circumstances

6. The Plaintiff resides approximately 200 metres from the accident locus and was familiar with the footpath from use, more often than not several times per week. The accident happened at approximately 9.30 pm on a fine evening; the area was well lit. The Plaintiff was walking along the footpath towards the junction of the slip road, with the N21 to his left. He gave evidence that just as he was reaching the junction he tripped on the elevated lip of the damaged concrete and fell to the ground, sustaining a very serious injury to his left ankle in the process. A passer-by came to his assistance and took him to Shannon Doc where he was examined and immediately referred to the emergency department of Limerick Regional Hospital.
7. Medical reports prepared by Mr. Finbarr Condon, Consultant Orthopaedic Surgeon, dated 9th October, 2013, 18th May 2015 and 19th January 2016 in which details of the Plaintiff's injuries, medical treatment and prognosis are set out, were admitted in evidence. An occupational assessment report prepared by Ms. Susan Tolan Occupational Therapist and Vocational Evaluator, dated 12th March 2018, detailing the Plaintiff's vocational history and capacity to work was also admitted in evidence.
8. Shortly after the accident the Plaintiff's solicitor took photographs of the damaged footpath at the accident locus; the photographs were admitted in evidence. The Plaintiff pleads a case in negligence and breach of statutory duty on the part of the Defendant for:
 - a. failing to maintain the public footpath;
 - b. in causing a dangerous tripping hazard; and
 - c. using inadequate procedures and/or methods to keep the area safe.

As mentioned earlier, the Defendant met the case with a full defence, incorporating pleas of non-feasance and contributory negligence.

9. Consulting engineers were retained by both parties, each of whom examined the locus *in quo*, took photographs, prepared reports and gave evidence at the trial. The thrust of Mr. O'Dowd's evidence, the Plaintiff's engineer, was that the design and layout of the junction failed to meet the minimum design and construction standards recommended by the National Roads Authority (NRA) for a simple urban road junction. In this regard the recommended minimum corner radius for such a junction is six metres but where

provision is required to accommodate larger vehicles, ten metres with a one in five taper over a distance of thirty metres is recommended.

10. At the junction *in quo* traffic exiting the slip road onto the N21 was permitted to turn left and right. The case advanced on behalf of the Plaintiff was that the insufficiency of the corner radius forced left turning HGV's to mount the pavement, damaging the footpath in the process. It was suggested that the Defendant should have addressed the problem by laying out the junction, particularly the footpaths, in accordance with the NRA minimum recommendations in order to accommodate left hand turning HGV's exiting the slip road. Alternatively, such vehicles should not have been permitted to use the slip road or, if permitted to do so, should have been prohibited from turning left onto the N21. For completeness, I should add that it was no part of the Plaintiff's case that the footpath should have been constructed to withstand the massive forces exerted when mounted and crossed by a HGV.
11. The subsequent construction works carried out in 2014, which involved a straightening of the footpath bend, met the objective of facilitating left turning HGV's to a limited extent though not sufficiently to eradicate the problem of the pavement being mounted. In this regard surface cracking seen by Mr O'Dowd in the new footpath at the *locus in quo* during a site inspection in April 2019 was attributed by him to this problem. The same cracking was already evident from photographs taken by Mr Fulham, the Defendant's engineer, during a site inspection nearly two years earlier on the 5th May, 2017. One of the striking features of the photographic evidence is that the cracking had not progressed in the intervening period nor had it led to a distortion in the pavement surface as had occurred previously, the most likely explanation which is to be found in Mr. Vallely's evidence, namely that the jointing in the pavement has a stabilising effect.
12. Mr. Vallely also gave evidence regarding vehicle use surveys carried out in the vicinity of the locus between the 7th and 22nd November, 2018 and the 4th January and 11th January, 2019, the results of which were made available to the Court. These survey results indicated a very low use of the slip road by HGVs, as low as seven per week on one survey. The volume of traffic on Sheehan's Road, which also leads down to a nearby junction with N21, is particularly heavy. The slip road is connected to Sheehan's Road and, at times of traffic congestion in particular, is used as a "rat run". On my view of the engineering evidence it seems reasonable to infer that the slip road was never intended for use by HGV's, however, there was no evidence of any use restriction to ordinary vehicular traffic, accordingly there was no prohibition of HGV user.

Defendant's Knowledge ; Conclusion

13. It is apparent from the photographs taken by the Plaintiff's solicitor shortly after the accident and from the evidence of the engineers that the damage to the footpath, including the elevated lip in the pavement, had been present for a considerable period of time prior to the accident and would therefore have been evident on inspection. The county engineer, Mr Vallely, gave evidence that the Defendant had a regime in place for the inspection of public roads and footpaths the essence of which was that all footpaths in the county area were inspected at least once a year, evidence which I accept. In this

regard, it is also pertinent to note that the county headquarters of the Defendant is located in close proximity to the accident locus. Accordingly, I am satisfied that the Defendant was very likely to have been aware of the nature and cause of the damage to the footpath, including the elevated lip in the concrete pavement, and the Court so finds.

Accident Circumstances; Conclusion

14. I had an opportunity to observe the demeanour of the Plaintiff during the trial and am satisfied he gave truthful evidence upon which the Court may rely. When certain matters concerning his past medical and vocational history were put to him on cross examination he readily acknowledged and accepted that a previous knee injury had a significant and long term impact on his capacity to work. This acknowledgement is particularly significant in light of the contents of the vocational assessment report prepared by Ms. Susan Tolan. I accept the Plaintiff's evidence that he tripped on the elevated edge of the concrete pavement and fell to the ground fracturing his left ankle in the process.

Liability; Submissions

15. It is not intended to summarise the oral submissions made on behalf of the parties, suffice it to say that it was submitted by senior counsel for the Plaintiff, Mr. Kiely, that this was a clear case of misfeasance the circumstances of which did not admit a defence of non-feasance. The design and layout of the junction, in particular the footpath *in quo*, was faulty and had led to the creation of the tripping hazard which gave rise to the accident. The slip road and its junction were not suitable for use by HGVs, a conclusion evidenced by the damage caused to the pavement when HGVs turned left onto the N21. In support of his submissions the attention of the Court was drawn to *McCabe v. South Dublin County Council* [2014] IEHC 529 and *Ryan v. Tipperary County Council* [2019] IEHC 345 and to the authorities cited therein.
16. Counsel on behalf of the Defendant, Mr Johnson S.C., submitted to the contrary and contended the ingredients necessary to constitute a defence of non-feasance had been satisfied. In support of this proposition he referred the Court to the statement of the law set out in *McMahon and Binchy Law of Torts*, 4th Ed. Chapter 24 at para. 123, under the heading "Highway Authorities". In circumstances where so little use by HGV's was made of the slip road he argued it would be wholly wrong to find that the junction and footpaths should have been laid out as suggested by Mr O'Dowd; such a finding would have immense fiscal and logistical consequences for local authorities. Furthermore, no evidence had been adduced of defect in the construction of the footpath *in quo*.

Decision

17. Firstly, with regard to user, the results of the road traffic surveys taken in 2018 and 2019, these must be viewed with some caution, taken as they were several years after the accident; it does not necessarily follow that the results are indicative of a traffic user in 2013. Indeed, no evidence was adduced of use at the slip road junction between construction in 2001 and the accident in 2013. However, in light of the findings already made suffice it to say that whatever the extent of use from the time of construction to the date of the accident the Defendant became aware that the pavement was being damaged

by HGVs mounting the footpath and that this ultimately led to what the Defendant fairly acknowledges was a tripping hazard for pedestrians.

18. While I accept the submissions on behalf of the Defendant that there was no evidence of a failure *per se* in the construction of the pavement to withstand the weight of HGVs passing over the footpath, the case made on behalf of the Plaintiff was that the junction, including the footpaths, should have been laid out in accordance with the NRA minimum recommendations for simple urban junctions. Had the guidelines been followed then, irrespective of frequency, HGVs turning left would have been facilitated in exiting the junction without the necessity in any circumstances of having to mount the footpath to complete the manoeuvre.
19. The footpath reconstruction in 2014 involved jointing which helped stabilise the pavement and prevent the cracking which occurred subsequently from becoming distorted and developing into a tripping hazard, as had occurred in the footpath constructed in 2001. However, it was no part of the Plaintiff's case that the footpath constructed at that time ought to have been jointed. Accordingly, I will make no further comment in relation to whether or not jointing of the pavement should have been employed at the time.
20. With regard to the initial construction of the slip road, while no definitive evidence of its genesis was adduced it appears to have been in existence for some considerable time prior to the works carried out in 2001, a significant fact in the context of the construction guidelines extant at the time. In this regard the National Roads Authority was established by the Roads Act, 1993 ("the 1993 Act"). Section 2 of the 1993 Act defines a footpath as "a road over which there is a public right of way for pedestrians only, not being a footway." Section 11 of the 1993 Act (as substituted by s. 6 of the Roads Act 2007) provides that the maintenance and repair of all such roads is a function of the relevant local authority. Amongst the responsibilities with which the NRA is charged is the production of guidelines for the construction of roads in the State; the guidelines were made subject to regular review.
21. The duty of the local authority *qua* highway authority is to maintain the public roads and footpaths in charge and, where applicable, to do so in accordance with the guidelines. Where a highway authority undertakes the design, layout and construction of a junction in an urban setting which includes footpaths, as occurred with the locus in quo, regard must be had to the junction design geometric considerations contained in the guidelines and referred to in the evidence of Mr O'Dowd; significantly, it was not suggested on behalf of the Defendant that these guidelines were inapplicable to the instant case.

Compliance with NRA Guidelines; Conclusion

22. In circumstances where there was no restriction on use of the slip road by HGVs, I am satisfied on the engineering evidence given by Mr O'Dowd, which I accept, that the footpath *in quo* was not designed and constructed in accordance with the design geometric considerations for simple urban junctions set out in the prevailing guidelines of the NRA. In the absence of vehicular restriction and the usage of the slip road as a 'rat run,' particularly during times of traffic congestion, it was reasonably foreseeable that the

slip road would be utilised by HGVs to enter the N21, particularly by those intending to turn left. If such vehicles were to be facilitated in carrying out this manoeuvre without running the risk of mounting the footpath the radius of the corner at the junction had to be sufficient to accommodate the requirement. Evidently, as the circumstances of the case demonstrate, the corner was not so laid out and constructed.

23. I cannot accept the submission made by senior counsel on behalf of the Defendant, Mr. Johnson that in reaching such a conclusion an obligation of immense economic and logistical proportions will be visited on local authorities to commence the reconstruction of urban and rural junctions on roads used by HGVs. No such consequence is intended nor does such an obligation follow from the findings and conclusions reached in this judgment. Rather the outcome is case specific to circumstances where, as occurred here, the Defendant highway authority undertook reconstruction works of a simple urban junction through which it permitted the unrestricted use of vehicles, including HGVs, after the publication of the NRA guidelines.
24. I should add for completeness in this regard that a relatively inexpensive precaution which could have taken to avoid or minimise damage to the footpath was to impose a user restriction on the slip road by confining use to ordinary vehicular traffic, especially in circumstances where it appears the slip road was neither constructed, designed or intended for use by HGVs, such restriction to be effected through appropriate signage and or a height limiting frame.

Conclusion; Misfeasance/Non-Feasance;

25. It is well settled that highway authorities are liable in damages for injuries and loss suffered by those persons lawfully using the highway if the injuries and loss have been caused as a result of the negligent construction, repair, maintenance or interference with the road or footpath but not by reason of want of repair; they are liable for misfeasance but not for non-feasance. See *Kelly v Mayo Co Council* [1964] I.R.315 at 318-319. It follows from the findings made and for the reasons given herein that the tripping hazard which gave rise to the accident arose by reason of negligence and breach of duty on the part of the Defendant its servants or agents, constituting as it does misfeasance; accordingly, the Defendant is liable at law for the injuries and loss suffered by the Plaintiff as a consequence thereof.

Contributory Negligence

26. As mentioned earlier the elevated lip in the surface of the pavement is fairly acknowledged by the Defendant to be a tripping hazard. Nevertheless no evidence was adduced of any complaints or reports of accidents having been made in respect thereof prior to the date of this accident. If there had been such evidence, it is unlikely the Plaintiff would not have sought to lead it during the course of the trial. However, it does not follow from the absence of such evidence nor would it be correct to reach a conclusion that there had been no previous complaints about the damaged state of the footpath or reports of accidents thereon in circumstances where it appears from the book of pleadings that no discovery thereof had been sought or made.

27. The Plaintiff is no stranger to the locus. As mentioned at the outset it emerged in the course of the evidence that he used the footpath regularly, located as it is within a short distance of his home. The damaged condition of the pavement, particularly the elevated concrete lip, is clearly evident from the photographs taken after the accident by the Plaintiff's solicitor. To have contended that the defect was neither obvious nor a tripping hazard would have been a lost cause, as it is the Defendant quite properly conceded this point. Whether the Plaintiff's failure to avoid such an obvious defect in the footpath was due to inadvertence, inattention or complacency arising from familiarity, there was no evidence his view of the hazard was obscured in some way, such as by another pedestrian. Nor was it suggested that the Plaintiff was in some way distracted such as, for instance, by watching out for traffic as he approached the junction or by using a mobile phone. In other circumstances inclement weather conditions and/or poor lighting might have provided some explanation, however such factors are not relevant here; the plaintiff fairly accepted the weather was clement and lighting conditions were good.
28. In common with other pedestrians using the footpath the Plaintiff had a common law duty to take care for his own safety. In circumstances where the weather was clement, the lighting was good and the damaged footpath, including the elevated concrete lip, were clearly evident to approaching pedestrians keeping a proper lookout and absent a reasonable explanation for the failure see, heed or avoid the tripping hazard, the Court finds the Plaintiff to be in breach of the common law duty of care he owed to himself and was thus guilty of contributory negligence.

Apportionment of Liability

29. Having reached these conclusions the next matter with which the Court is tasked is the apportionment of liability between the parties. Section 34 (1) of the Civil Liability Act 1961, as amended, requires the apportionment to be made "...having regard to the degrees of fault of the Plaintiff and Defendant. The law on how that task is to be approached is well settled, namely, by considering the blameworthiness of the parties' respective causative contributions rather than on the basis of the relative causative potency of thereof to the damage. Fault or blame is to be measured by objective rather than subjective standards; accordingly blameworthiness is to be measured against the standard of conduct required of the ordinary reasonable person in the class or category to which the party whose fault is to be measured belongs. Degrees of fault assessed by the Court express the extent of the departure by the guilty party from the standard of behaviour to be expected from a reasonable person in the circumstances of the case. See *Snell v Houghton* [1971] I.R. 305 at 309; *O'Sullivan v Dwyer* [1971] I.R. 275 at 286; *Carroll v Clare Co. Council* [1975] I.R.221 at 226-227.

Conclusion; Apportionment

30. Applying these principles to the facts of the case in hand I am satisfied that the greater degree of fault should be borne by the Defendant as the creator of the hazard. As to the Plaintiff, having regard to his knowledge of the damaged pavement at the locus in quo, the obvious nature of the hazard and the absence of mitigating factors such as distraction, inclement weather, obstruction of view, or poor lighting, I am satisfied he should bear a significant degree of fault. Accordingly, the Court will apportion fault as to

one third against the Plaintiff and two thirds against the Defendant; and the Court will so order.

Quantum

31. The Plaintiff suffered very serious injuries to his left ankle necessitating surgical intervention by Mr. Finbarr Condon, Consultant Orthopaedic Surgeon; the surgery was carried out on the 17th April, 2013. As mentioned earlier, the medical evidence in the case is comprised in three medical reports, which were admitted, dated the 9th October, 2013, 18th May, 2015 and 19th January, 2016. I have read the reports and accept the contents as evidence of the injuries sustained by the Plaintiff. He suffered a very severely comminuted medial malleolar fracture, a small fracture of the posterior malleolus lip and a Weber B fracture of the fibula. Surgery involved open reduction and internal fixation under general anaesthesia involving the insertion of a plate and screws laterally with an infra-fragmentary screw compression together with a Buttress plate medially holding the comminution together through intra fragmentary lag screws.
32. X-rays taken on the 9th of July, 2013 show the fractures healing in good position with a satisfactory overall alignment of the leg and foot, however; the beginning of joint space narrowing was also seen on the antero-medial corner and the posterior-lateral corner of the malleolar fracture consistent with the articular damage sustained at the time of the injury. In his report of October 9th, 2013, Mr. Condon described the ankle fracture as being significant and given the articular cartilage damage which had occurred at the time of the accident, not commonly seen in ankle fractures, he categorised it at the high end of the scale for seriousness. Although reasonably well fixed in good anatomical position, a factor which would contribute to minimising the risk of significant symptoms long term, Mr. Condon had little doubt that the Plaintiff would continue to walk with a limp and that this problem would be permanent due to the articular cartilage damage suffered at the time of the injury.
33. Furthermore, in his opinion the Plaintiff would never again be able to run again and would experience other functional limitations, such as difficulty walking on uneven ground or attempting to use steps or ladders. While he thought the Plaintiff might experience a symptomatic improvement in the short term, given the nature of the injury it was likely he would experience progressive degenerative arthritis which would manifest in later years as a stiffness and possibly soreness in the ankle; whether and to what extent further treatment would be required would depend on the level of symptomology and would have to be assessed at that time.
34. When carrying out an assessment of damages a court must apply certain well settled principles of law, discussed at some length in *B.D. v The Minister for Health* [2019] IEHC 173. Regard must also be had to the Book of Quantum (see Section 22 (1) of the Civil Liability and Courts Act 2004) though the section also provides that the requirement is not to operate so as to prohibit the court from having regard to other matters; the court is not confined to the ranges of damages specified. Notwithstanding the comprehensive revision of the Book of Quantum by the Injuries Board in 2016, there are some types of injury where no guidance at all is offered. There was no controversy between the parties

as to the range within which the case fell, Mr Johnson very fairly accepting that the Plaintiff's injuries and probable future sequelae were such as to warrant a categorisation and assessment as being serious and permanent as per the revised Book of Quantum.

35. The Plaintiff gave evidence that he suffered very serious pain and discomfort in the immediate aftermath of the accident and subsequently during a lengthy postoperative period of recovery. Although he experienced a considerable improvement in symptoms with the passage of time he is unable to ambulate normally and walks with a limp, moreover, he remains symptomatic and continues to take anti-inflammatory medication and painkillers on a daily basis. Significantly, as the post traumatic arthritis prognosticated in the medical reports develops his symptoms will probably increase over and above current levels, though to what degree remains uncertain at this time.

Conclusion; Quantum

36. Accordingly, I am satisfied that the Plaintiff suffered serious injuries the consequences of which are likely to be permanent. With regard to vocational implications of the injuries, I am satisfied that he has been unable to undertake any form of pre accident part time work, furthermore, on my view of his evidence and the medical evidence it is unlikely he will to be able to do so in the foreseeable future.
37. Reference has already been made to the decision of the Court in *BD v The Minister*, supra. The fundamental principle of law to be applied in the carrying out of an assessment of damages is that the amount of the award must be fair and reasonable to the parties. In practice this means that the award must be commensurate with and proportionate to the injuries, the impact thereof on the Plaintiff and the interference, if any, which these have had or are likely to have on the Plaintiff's enjoyment of the amenities of life. Applying these well-settled principles to the findings made, the conclusions reached and having had regard to the appropriate range of damages set out in revised Book of Quantum, the Court considers that a fair and reasonable sum to compensate the Plaintiff for pain and suffering to date and into the future, commensurate with the injuries sustained, is €90,000. It follows from the apportionment of fault that this amount falls to be reduced by one third to €60,000. And the Court will so order.