THE HIGH COURT

[2022] IEHC 431

[2019/6847/P]

BETWEEN

GERALDINE KEANE

PLAINTIFF

AND

DONEGAL COUNTY COUNCIL

DEFENDANT

JUDGMENT of Ms. Justice Bolger delivered on the 8th day of July, 2022

Introduction

1. The plaintiff is a civil servant who resides at Castlerea in County Roscommon. On 27 July 2018 she was visiting her sister who lives in Dungloe in County Donegal. The plaintiff had gone into a gift shop and having come out, decided to cross the road in order to attend an art exhibition taking place at the Daniel O'Donnell Centre. She crossed the main street of Dungloe diagonally and when she reached the other side of the road she stepped onto a raised kerb which she believed was flush with the pavement. However, unknown to her there was a double step coming down from the raised kerb to the pavement. She fell to her right and sustained a significant injury to her right elbow. She pleads in her Personal Injuries Summons

that this was due to the negligence, breach of duty and breach of statutory duty on the part of the defendant, its servants or agents in or about the design, construction, makeup, maintenance, upkeep, warnings and/or inspection and/or the provision of the footpaths and roadways at the said locus of the accident. She subsequently adduced further particulars of negligence in which she claimed that the defendant had designed and constructed a highly unorthodox arrangement between the roadway, kerb and pavement, requiring a pedestrian moving from the roadway to the pavement to step up on a raised kerb and then to step down to an initial lower level on the pavement and then to make a further step down to a still lower level of pavement and thereby gave rise to foreseeable hazard for such pedestrians. She accuses the defendant of having created an unusual feature and having failed to give any or any adequate warning or notice of the existence of it, and effectively having concealed its existence. She accuses the defendant of having failed to take any steps by way of barrier or otherwise to prevent persons moving from the roadway onto the pavement in that location, having created hazardous features and having failed to provide any or any adequate means such as handrails to identify the features and assist pedestrians in negotiating them safely.

2. The Council deny all allegations and claims that the plaintiff was responsible for the accident by not keeping a reasonable lookout as she crossed the road and that the arrangement of a raised kerb followed by two steps was readily apparent to anybody keeping a reasonable lookout.

3. I set out below the relevant evidence given by the plaintiff, the engineers and the medical witnesses. I then set out my discussion and then my decision firstly on liability and then on quantum.

A. <u>Liability</u>

The plaintiff's evidence

4. The plaintiff identified on her engineer's photo number 3 where she fell as she was crossing the road. She said she did not notice the two step drop as she was crossing the road and when she stepped up on the kerb she thought she would be on a level footpath. On cross examination the plaintiff was less clear about the location of the accident and having originally identified it as having taken place near a grid in the road which she said she remembered, she then suggested it may have taken place in front of a chamber on the footpath or possibly further down from it. All those identified locations were within the same stretch of footpath where there was a two step drop from the kerb to the footpath. The plaintiff said that she could not see the difference in height between the kerb and the footpath when she was crossing the road and that had she seen it, she would have moved to the right of the kerb to a dished kerb area in order to get onto the pavement safely.

Evidence of the plaintiff's engineer

5. Dr. Mark Jordan, forensic engineer, confirmed that there was no pedestrian crossing available to the plaintiff at the area she wished to cross the road although there is a pedestrian crossing some 200 metres further up the hill. He described the locus of the accident as having created an illusion of a pavement flush with the kerb by, *inter alia*, the manner in which the pavement sloped in both directions. He explained that the plaintiff expected what would ordinarily apply, i.e. a kerb as an abutment for the pavement, but that what she encountered was a two-step drop. Photographs taken from her angle of travel showed the pavement appearing level with the kerb whereas photographs taken from the opposite angle gave a clear indication of the drop. He described the arrangement as highly unusual and unsafe for a pedestrian but that had the arrangement been made up of a kerb followed by one step, that the plaintiff's foot would have dropped and she could have regained balance i.e. she would have

had a good possibility of recovery. However, the two steps meant that her loss of balance was irrecoverable and her chances of recovery evaporated.

6. Dr. Jordan suggested that the difference in level between the two sides of the road could have been addressed by paving the pavement on the lower side rather than by the two step drop that the defendant put in place. He also suggested that the problems, as he perceived them, caused by the two step drop could have been alleviated by the provision of a handrail, the erection of barriers or the provision of warning signs all of which would require a pedestrian to look down and thereby be alerted them to the hazard created by the two step drop. A handrail could be fitted easily by way of a surface mount which would take less than one hour to install. Barriers would not be required all the way down the street because of the existence of other features which meant that the illusion of a flush pavement did not occur elsewhere.

7. The defendant had produced photographs of other roadway/pavement arrangements elsewhere in the country which they suggested demonstrated that this was not such an unusual arrangement. Dr. Jordan distinguished all of those examples as either a one step drop or where features such as bollards or barriers were provided that alerted a pedestrian to the drop.

8. Dr. Jordan said that applicable engineering standards from 1995 when the arrangement in question was installed required the pavement be flush with the kerb or an abutment wall and in any event, required any arrangement to be done safely.

9. Dr. Jordan criticised the plaintiff for not looking more closely at where she was going.

Evidence of Mr. O'Brien, the defendant's engineer

10. Mr. O'Brien explained that the arrangement had been put in place to fix the difference of approximately 900 millimetres in height between the two sides of the road, to fix the alignment, and to manage storm water drainage by way of a two step drop which he described as good road design. The absence of a kerb would have created risks of flooding and of motorists mounting the pavement. The difference in height should have been obvious to the plaintiff when she was crossing the road. He accepted that one of his photos taken from the angle of the plaintiff's approach did not show the second step but he contended that step became more obvious approaching closer to the kerb. It was difficult to identify the visibility of the height from photographs as versus a physical inspection because, he said, photographs did not provide the same sense of depth as a physical inspection would. He accepted on cross examination that if a person did not know that the second step was there, they would be at a risk of falling, and that the two-step arrangement was less usual and would not be expected by pedestrians. He accepted that looking at his photograph 2s, there was not a lot to alert the plaintiff of the second step but explained that a difference in colour and texture between the two steps should have alerted her. He highlighted the greater visibility of that difference in colour and texture from the photographs he had taken from the reverse of the plaintiff's approach and accepted that a different angle of sight could render that difference in colour and texture less visible.

11. Mr. O'Brien disputed Dr. Jordan's proposals to render the locus of the accident less hazardous. He did accept that it is difficult for pedestrians to look down at their feet at the same time as they are looking for traffic on the road and that such a person is more likely to look down if a feature required them to do so. He described a handrail as not doing any harm but inconsistent with the principle of good pavement/road design that excessive street furniture should be avoided. He suggested barriers might be a problem for pedestrians starting to cross from one side of the road who might then be unable to get onto the pavement

on the opposite side. He did accept that the defendant had installed barriers elsewhere in the town at the location of a similar two step drop. He said warning signs would be ineffective because they would not be seen until after the point at which the pedestrian had encountered a risk of falling and would also impede the line of sight for motorists at the corner.

Evidence of Paul McGee, council engineer

12. Mr. McGee confirmed that this design had been approved by his predecessor to ensure alignment of the topography in the area and prevent a risk of flooding. He was unaware of any complaint by a pedestrian or public representative about the locus of the accident. He confirmed that barriers, bollards and a handrail at different locations in Dungloe, situated on similar two step drops, had been erected by the Council. He disputed that it would have been appropriate to put similar barriers at the locus of the accident as he said the policy of the Council was to keep railings to a minimum.

A. Decision on liability

13. I accept the defendant's reason for installing this two steps arrangement, i.e. to address the different levels of road surface in Dungloe and prevent flooding. However, that is insufficient to excuse the defendant of any liability.

14. It was not seriously challenged by the defendant that if a pedestrian was unaware of the two step drop, that they are at risk of falling. The court must therefore assess whether the plaintiff was made aware of the two step drop, whether it was a usual arrangement, what the applicable engineering standards were in 1995 and whether it was a danger.

A(1). Was the plaintiff made aware of the two step drop

15. Having considered the evidence of the plaintiff and both engineers, I find that the plaintiff was unaware of this two step drop when she was crossing the road because it was not made obvious to her from her angle of travel. There is a difference of colour and texture between the steps which is far more obvious to a pedestrian coming from the pavement area to which the plaintiff was walking. I consider it reasonable for the plaintiff not to have seen the two steps from her line of travel and in that regard I prefer the evidence of the plaintiff's engineer in relation to the lack of visibility of the difference in height, colour and texture of the kerb, the two steps and the pavement.

A(2). <u>Was this an unusual arrangement?</u>

16. The defendant identified a number of locations around the country which they claimed showed similar arrangements to deal with different heights at both sides of a roadway leading to a pavement. Almost all of those locations can be distinguished from the locus of this accident, whether by reference to the location of the two step drop or the use of features such as barriers, bollards, railings or flower pots to alert pedestrians to look down and thereby reduce their risk of falling over the drop. One urban location in Dublin with a similar two step drop without those features was identified but that location is very different from Dungloe as it involves a series of cycle lanes, a trench area at least some of which contained weeds and what appears to be an access roadway rather than the pavement that exists in Dungloe. Even if that Dublin locus is comparable, the fact that the defendant could only identify one similar arrangement in the country evidences the unusual nature of the two step arrangement.

17. I find that this two step drop was an unusual arrangement.

A(3). Applicable engineering standards in 1995

18. Both engineers were in agreement that no standards were in existence in 1995 relating to the conjunction of the footpath and the roadway when this arrangement was put in place. Therefore, the only standard that is relevant from that time is the need to avoid danger in constructing a pathway arrangement.

19. I am satisfied that by the standards of the time, the construction of this two step drop without installations in place to alert pedestrians of this danger, was unsafe and not adequate for the purpose of accommodating pedestrian traffic crossing the roadway towards the footpath. This is in line with the approach of O'Hanlon J. in *Hampson v. Tipperary County Council* [2018] IEHC 448 where she found the converse, namely that the construction of the footpath by the standards of the time was adequate for the purpose of pedestrian traffic on the footpath.

A(4). Was the roadway/pavement a danger?

20. Counsel for the defendant described this case as a road design case and suggested there was no Irish authority on this point but submitted a Northern Ireland decision of *Keenan v. Department of the Environment for Northern Ireland* [1995] NI 343 where the plaintiff claims she fell as a result of an actionable unevenness in paving stones on a footpath for which she claimed the defendant road authority was liable in negligence. Girvan J. in determining the test of whether the road was dangerous described as "comprehensible and workable" the test stated by Lord Denning in *Morton v. Wheler* (31 January 1956 Bar Library No. 33) cited in *Dymond v. Pearce* [1992] 1 QB 496 and approved by the Court of Appeal in *Rider v. Rider* [1973] 1 QB 505 at p. 513 where he stated:

> "If a reasonable man, taking such contingencies into account, and giving close attention to the state of affairs, would say: 'I think there is quite a chance that someone going along the road may be injured if this stays as it is,' then it is a danger; but if the possibility of injury is so remote that he would dismiss it out of hand, saying: 'Of course, it is possible but not in the least probable,' then it is not a danger".

21. Applying that test to Ms. Keenan's accident, Girvan J. concluded that the defect in the pavement where the plaintiff fell was not such as to make the pavement at that point dangerous. He said he was satisfied "that standing back and looking at the pavement before the plaintiff's fall, one would have said that the risk of injury at the point where the plaintiff fell was not in the least probable".

22. I have found the formulation of that test and its application in *Keenan* helpful. Applying a similar approach to that adopted by Girvan J. in seeking to stand back and look at the pavement before the plaintiff's fall and in particular looking at it from the angle of the plaintiff when she crossed the road from the other side, I am satisfied from the plaintiff's evidence, the photographic evidence and the evidence of the plaintiff's engineer, that it was not easy for the plaintiff to see the two step drop from that angle. I am satisfied that a reasonable person would say there is quite a chance that a pedestrian going from the road to the pavement may be injured by the two step arrangement in the absence of anything to alert them of its existence.

23. The risk from the two step arrangement was from the defendant's misfeasance as it arose from the design of the arrangement rather than from any failure to maintain the pathway. It is therefore within the alternative situation as identified by Kingsmill Moore J. in *Gallagher v. Leitrim County Council* [1955] 89 ILTR 151 (quoted by Noonan J. in

O'Riordan v. Clare County Council and Response Engineering Ltd [2021] IECA 267 as follows:

> "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".

24. I am satisfied that the defendant put this two step arrangement in place in 1995 and in doing so without including anything to alert pedestrians of its existence, they did it in a way as to create a danger and are therefore liable.

A(5). Contributary negligence

25. The plaintiff would not have been expecting this unusual arrangement. As set out above, I have found that she did not see it as she was crossing the road. Unless she looked down as she stepped onto the pavement, there was a foreseeable risk that she would fall.

26. The question is therefore whether the plaintiff bears any responsibility for her failure to look down. Both engineers criticised her for not keeping a more careful lookout. The extent of the plaintiff's contribution depends on the extent (if any) to which the defendant bears responsibility for not having alerted her to this unusual arrangement in time for her to take account of it in how she made her way to the pavement.

27. The plaintiff's engineer identified a number of options that could have caused the plaintiff to look down and thereby be made aware of the two step drop including a handrail and barriers, both of which are utilised elsewhere in Dungloe over areas further up the main street where the same two step drop is in place to, presumably, deal with the same height difference and flood risk issues. The plaintiff's engineer described a simple method of

installation by the use of a surface mount. That evidence was not challenged although the defendant did challenge the plaintiff's engineer's proposals as inconsistent with the principles of good road design to keep street furniture to a minimum, and stated that a warning sign would have been ineffective. I prefer the evidence of the plaintiff's engineer on the feasibility and benefits of what could have been put in place to alert pedestrians of the two step drop, particularly having regard to the existence of similar installations elsewhere in Dungloe in spite of the defendant's apparent misgivings about how they might interfere with good pavement or road design. I also find that a warning sign could have been erected somewhere on the relatively large pavement space that would have alerted pedestrians crossing the road of the two step drop in sufficient time and in a way that would not have blocked driver's views, particularly given that other objects such as flowerpots have been installed presumably without concerns about compromising road safety.

28. Therefore the plaintiff could have been alerted of the two step drop either by a feature causing her to look down or by expressly advising her of the risk before she reached the other side of the road. The defendant's failure to put such an alert in place renders them liable in part for the plaintiff's accident.

29. Taking account of the defendant's said failure and the plaintiff's failure to keep a more careful lookout, I assess liability in this case as 50/50 between the plaintiff and the defendant.

B. <u>Quantum</u>

30. The evidence of the plaintiff's injury to her right elbow, the treatment in the immediate aftermath, and the nature of the plaintiff's recovery from surgery is not particularly contentious. The disagreement lies in the extent of the consequences her injuries

have had and will present for her into the future in the light of the permanent restriction of movement she has sustained.

B(1). The plaintiff's evidence

31. The plaintiff was brought to hospital by ambulance suffering from very severe pain in her right elbow. X-rays showed a dislocated fracture of her right elbow. She was immediately brought to theatre for reduction, and again two days later for fixation of the fracture with plating of her proximal ulna and fixation of a fracture of the radial head with screws. She was treated in a back slab and detained in hospital for a number of days. Her stitches were removed ten days after surgery and a brace was put in place for six weeks. She was referred for physiotherapy.

32. The plaintiff experienced severe pain and restrictions in her daily activities for many months and was unable to return to work or to her own home where she lives alone. She eventually returned to work on a part-time basis and her home some four months post-accident. She returned to full time employment some months later and had been facilitated by her employer with adaptive equipment.

33. In October 2015, three months post-accident, the plaintiff's GP prescribed SSRI medication to treat the plaintiff's severe anxiety and low mood and referred her for counselling. The plaintiff continues to take that medication and attends counselling to date, and finds both to be effective in dealing with her anxiety.

34. The plaintiff's main complaints at present are ongoing pain for which she takes painkillers and which she finds severe enough to disturb her sleep. She has a loss of range of movement in her right elbow which renders her unable to touch her right shoulder or put her right arm behind her. The plaintiff continues to attend physio and maintains a home exercise

regime. Repeated movement of her right arm causes pain and makes it very difficult for her to do heavy hoovering, mopping or gardening. That represents a considerable inconvenience for her as she lives alone. The plaintiff now only keeps a small section of her garden and has to avail of assistance from her niece for her heavier housework.

35. The plaintiff had previous issues with wrist pain, carpel tunnel syndrome and arthritis in both wrists for which she availed of medical attention in 2016 and again in 2018 shortly before the accident. She also has a history of vertigo. She says that her previous complaints and treatment did not cause the pain or interference with her daily living that she now experiences.

36. The plaintiff's treating orthopaedic surgeon, Professor John McCabe, gave evidence, as did Dr. Aileen Henry, consultant physician in orthopaedic medicine to whom the plaintiff was referred by her solicitor. Professor McCabe confirmed residual ache and restriction of movement of 10% loss of flexion in her right elbow which he describes as a long term residual problem, but he does not anticipate any major change in the future other than a small risk of arthritis. He described the plaintiff as having had an excellent outcome from her complex surgery. He confirmed that there are some tasks the plaintiff cannot do with her right arm but that most people learn to compensate with their left arm. Arduous physical repetitive activities requiring movement including hoovering, mopping and heavy gardening will cause the plaintiff pain and may well be difficult for her. Professor McCabe expressed surprise at some of the conclusions the plaintiff's occupational therapist had drawn about her ongoing difficulties including with carrying a bag of sugar in her right hand, a lack of balance and with washing her hair.

37. Dr. Henry confirmed ongoing tenderness in the plaintiff's right elbow as well as pins and needles which Dr. Henry attributed to the elbow injury, but expected they would settle.

Dr. Henry did acknowledge not having had access to the plaintiff's medical records about her previous complaints and treatment for pain and carpel tunnel syndrome in both wrists.

38. The plaintiff's occupational therapist, Fiona O'Loughlin, prepared a report setting out the plaintiff's needs into the future on the basis of what Ms. O'Loughlin found was an inability to weight bear through her right hand including carrying anything other than small weights, an inability to do heavy housework such as hoovering, mopping, painting or gardening and overhead activities including holding a hair dryer over her head with her right hand.

B(2). <u>The defendant's evidence</u>

39. The plaintiff was seen by Mr. O'Rourke, consultant orthopaedic surgeon for the defendant, and much of his findings on the plaintiff's treatment are similar to those of Professor McCabe, namely that the plaintiff suffered a fracture dislocation to her right elbow requiring surgical treatment which has healed but has left the plaintiff with residual restriction of movement which is likely to be permanent. Mr. O'Rourke acknowledged that there is tenderness over the lateral epicondyle consistent with a tennis elbow type problem which may require local steroid injection. He anticipates that this should resolve in the long term. He considers the restriction involving the radial head not to be severe and anticipates it should not cause any significant functional problems. He confirmed that the plaintiff does have an increased risk of osteoarthritis developing. He opined that her current restriction movement may deteriorate slightly in the longer term, but should not cause significant functional problems. He confirmed that the plaintiff would suffer an intermittent ache in relation to certain household activities such as hoovering and acknowledged a challenge for the plaintiff to do heavy gardening.

40. Mr. O'Rourke considered it unlikely that the plaintiff's symptoms of a mild carpel tunnel syndrome or any ongoing pain and problems with both wrists could be due to her elbow injury.

B(3). Decision on quantum

41. The plaintiff sustained a serious injury to her right elbow as a result of which she has permanent limitation of movement and scarring. She experienced severe pain and interference with her normal lifestyle for many months post-accident including anxiety for which she was prescribed medication which she continues to take. She has been able to return to work and has been facilitated by her employer through the provision of adaptive equipment. She continues to experience regular pain. The permanent restrictions in the movement of her right arm cause and will continue to cause her difficulty in performing some of the heavier housework tasks and house maintenance such as hoovering, mopping, gardening and painting, which she was previously able to perform without difficulty. The plaintiff faces a small risk of arthritis in her right elbow.

42. The plaintiff also has ongoing issues with her right hand and wrist, but I am not satisfied that those symptoms can be attributed to the elbow injury particularly given the plaintiff's previous history and medical difficulties with both of her wrists. The plaintiff's GP, Dr. Uí Dhalaigh, expressed reservations about Professor McCabe's reluctance to attribute the plaintiff's ongoing wrist pain and pins and needles to her elbow injury. Insofar as there is any inconsistency in their evidence about the plaintiff's problem with her right hand, I preferred the evidence of Professor McCabe who was the plaintiff's treating orthopaedic specialist. I am not satisfied that any ongoing issues the plaintiff has with her right wrist or lack of power in her right hand are due to her elbow injury.

43. I consider that the plaintiff has sustained a moderately severe injury from which she has permanent restriction of movement, a small risk of arthritis, permanent scarring, and ongoing pain and psychological consequences. I have had regard to the Book of Quantum in assessing general damages though I note that the range of value for a moderately severe elbow injury does not make express provision for the scarring and psychological damage that this plaintiff has suffered.

44. I assess general damages for pain and suffering to date and into the future at €90,000.

45. The plaintiff has also claimed special damages some of which are agreed in the amount of €7,482. The plaintiff also claims the expenses she says she will incur in paying for the equipment and assistance that her occupational therapist advises she will need arising from her reduced level of function. Ms. O'Loughlin has made a number of recommendations including services, housing adaptations and transport recommendations. Some of these recommendations arise from the plaintiff's functional limitations which do not derive from her elbow injury, including reduced power in her right wrist and balance issues. Other recommendations such as weekly hairdressing appointments do not reflect the plaintiff's evidence of her current need for assistance due to her restricted movement.

46. I am satisfied that the plaintiff has and will continue to experience difficulties in performing heavy household and house maintenance chores such as hoovering, gardening and painting. She is entitled to special damages to enable her to secure assistance in relation to those tasks although I do not consider she will need assistance as regularly as has been suggested by the occupational therapist given the plaintiff's own evidence of household and gardening chores that she can do, and the occasional nature of the heavy chores she is unable to do. I measure a figure of €20,000 for the future costs of paying for assistance with the chores that cause her pain.

47. The total of general and special damages comes to €117,482. Taking account of the plaintiff's contributory negligence at 50% the plaintiff is entitled to an order in the amount of €58,741.

Indicative view on costs

48. As the plaintiff has succeeded in her proceedings my indicative view on costs in accordance with s.169 of the Legal Services Regulatory Act 2015 is that she is entitled to her costs. It seems to me that given the level of damages she has secured that those costs should be on the High Court scale but if either of the parties wishes to make any further submissions about costs or final orders to be made they are free to do so by way of oral submissions at 10:30 a.m. on 21 July. I do not require written submissions unless one of the parties wishes to make them in which case they should be filed with the court 24 hours in advance of the date on which the matter is back before me.