THE HIGH COURT

[2020] IEHC 697

[2018/10036P]

BETWEEN

CIARA FINLAY

PLAINTIFF

AND

SCOIL MHUIRE NATIONAL SCHOOL

DEFENDANT

Judgment of Mr Justice Bernard Barton delivered on the 9th day of December, 2020.

Introduction

1. The Plaintiff was born on the 5th May, 1984 and is the mother of one daughter; she is homemaker. These proceedings are brought to recover damages for personal injuries and loss arising as a result of an accident which occurred on the morning of 30th August, 2017 at approximately 9.30 am when she fell while descending a set of external steps at Scoil Mhuire National School, Hale Street, Ardee, County Louth. It was the first day of the new school year. The Plaintiff's daughter was due to attend fifth class. She was a little apprehensive at the prospect so the Plaintiff accompanied her to the school playground, where she met her classmates. The playground adjoins the building housing the 1st to 6th class schoolrooms. The school was constructed within its own grounds on an elevated site set back from Hale street, as depicted in photographs taken by Mr Joe Downing, a Consultant Engineer retained on behalf of the Plaintiff. He carried out an accident locus inspection, prepared a report containing his opinion and gave evidence at the trial.

2. The school was opened in 1956 and at all material times had an enrolment of approximately 300 children per year. Access to the school grounds at the time of the accident was via two entrances, a main entrance and a side entrance, both of which are on the same level and adjoin the public footpath on Hale Street. The main entrance is accessed by double gates, flanked by the side entrance, which is also gated. From the main entrance a short driveway of approximately 25 to 30 metres leads directly to a semi-circular retaining wall, which is about two metres in height from the level of the driveway and approximately 20 metres in length; exact measurements for these dimensions and distances were not given in evidence.

3. The wall is constructed of stone blocks. A decorative wrought iron safety railing was fitted to the top of the wall and runs for its entire length. There is an elevated area of ground to one side on which the school buildings have been constructed and the playground is located; the ground is level with the top of the wall. Access to the school buildings from the main entrance driveway is via two flights of concrete steps constructed adjacent to the wall, one at each end. Each flight follows the contour and terminates at the top of the wall. There are seven steps in each flight. The main entrance to the school building is directly opposite the wall and railings but is separated by an area of ground in between. The area involved is sufficiently wide to accommodate pedestrian and vehicular traffic.

4. This area has an oval shape on one side, following the semi-circular contour of the wall. Driveways extend from this area on one side towards the junior school buildings and on the other towards the 1st to 6th class buildings and playground, where the Plaintiff left

her daughter. The accident happened on the flight of steps leading to and from the playground. Mr Downey measured the width of the steps at 1.5 metres. The retaining wall is immediately adjacent to the right of the steps as one descends, a clipped hedge bounds the steps to the left. Viewed from Hale Street, the side/ pedestrian entrance is located to the left of the main entrance. A pathway leads from this entrance to the buildings housing the junior infants' classrooms which may also be accessed by the flight of steps located on the left at the end of the retaining wall.

The Accident: Injuries

5. Weather conditions on the day of the accident were good; it was a bright, dry day. The Plaintiff had nearly reached the bottom of the steps when she lost her footing and fell forward, ultimately landing face down on the ground near the foot of the steps. She suffered an undisplaced Weber B fracture of her right distal tibia. The Weber classification categorises fractures of the distal tibia either as A, B and C or 1, 2 and 3. The Plaintiff also suffered a small avulsion flake fracture from the navicular bone on the dorsal aspect of her left foot. Medical reports dated 16th March, 2018 and 1st November, 2019 prepared by Mr Aaron Glynn, Consultant Orthopaedic Surgeon, in which medical diagnosis, treatment and prognosis is set out were admitted in evidence. X-rays and an MRI scan show the fractures to have healed in anatomical position, but with a small area of synovitis in the right ankle. The Plaintiff was particularly disabled for the first eight weeks post-accident, during which time she had to mobilise with the use of a wheelchair. Her right ankle was placed in a plaster of Paris cast and her left ankle was strapped. She found walking very difficult and was unable to get into or out of a car. Her injuries were acutely painful in the immediate aftermath of the accident

6. The Plaintiff was prescribed powerful painkillers and anti-inflammatories. The pain gradually abated over time, though the Plaintiff has not fully recovered from her injuries and continues to be intermittently symptomatic. In this regard she continues to experience soreness in her right ankle, particularly when driving long distances. Walking long distances is also problematic and provokes pain if attempted. While she has made good progress towards recovery she remains intermittently symptomatic.

7. The Plaintiff has a relevant pre-accident medical history in that she suffered from and was treated for fibromyalgia; she continues to take medication for this condition. However, when she experiences particularly acute ankle injury symptoms she also takes morphine-based painkilling medication, though she tries to avoid doing so in order to mitigate addiction risk. Apart from intermittent ankle discomfort, medical prognosis for the future is that the injury should not cause any disability in the long term; any ongoing discomfort should respond to appropriate training with physiotherapy and occasional analgesia. As to the cause of ongoing symptoms Mr Glynn's opinion is that the most likely explanation is the small area of synovitis seen on MRI scanning.

Liability: Pleadings

8. The Plaintiff's medical reports having been agreed as the medical evidence in the case, the contest between the parties centred on the issue of liability. A full defence was delivered to the claim which included a plea of contributory negligence. The case pleaded

in the Personal Injury Summons is that the steps constituted an unusual danger in that they were hazardous, dangerous, unsafe, uneven, defective and poorly designed. Furthermore, there was a failure to maintain, inspect, repair and the keep the steps free from tripping hazards. Additional particulars of claim were delivered on 19th November, 2020 in which it was alleged that the Defendant was negligent in failing to provide handrails on the steps. I pause here to observe that although there is no mention of the absence of handrails in the Personal Injury Summons, the Court accepts that the Plaintiff made this complaint to her solicitors when she first consulted with them after the accident.

Cause of Accident: Loss of Footing

9. The Plaintiff very fairly accepts that she does not know what caused her to lose her footing and fall. She was very familiar with the steps and gave evidence that she would have used them on umpteen occasions. It follows that she was or ought to have been aware that there were no handrails. The accident was witnessed. There were people waiting to come up the steps and also people following the Plaintiff wanting to come down, one of whom gave evidence that she saw the Plaintiff fall but did not know why she had fallen. In fairness to the Plaintiff, not only did she not venture an explanation for the fall she even went so far as to say that she not been injured and would probably have got up and walked away had she been able to do so; evidence which is not insignificant. However, the serious nature of her injury meant that she was unable to move. She gave evidence that there was nothing to grab onto when she started to fall – she believed that if there had been a handrail she could have grabbed a hold of that. I took her evidence in this regard to mean that if she had been able to grab hold of a handrail this would likely have arrested her fall altogether or, if not, would at least have minimised the extent of her injuries.

Case Advanced

10. Apart from the absence of handrails, no case was made at trial that the steps were in any way inherently defective or that there was a tripping hazard thereon. The only engineering evidence adduced was given by Mr Downey. He gave evidence in relation to statutory regulations relevant to the provision of hand rails, specifically the Building Control Regulations 1991 (S.I. No. 306 of 1991) as amended up to and including the Building Control Regulations 2014 (S.I. No. 9 of 2014). He fairly accepted that there are no statutory regulations which require external steps of the type in question to be provided with handrails; however, in his opinion, when regard was had to the statutory requirements in relation to steps and stairs in general it was good practice to install a handrail; given the measured width of the steps at 1.5 metres, handrails should have been fitted on both sides of the steps.

11. Mr Downey also very fairly agreed, I thought, with the proposition that if the steps were being constructed today there is no requirement under parts K and M of the First Schedule of the 1991 Building Regulations S.I. No. 306/1991, that a handrail or rails should be fitted to steps of this type. Nevertheless, in his view it would be good practice to do so. Apart from anything else the practical fact of the matter was that the absence of handrails meant there was nothing to grab hold of in the event of a mishap while using

the steps. Furthermore, in circumstances where the steps were so heavily used retrofitting handrails was appropriate and would have been comparatively simple and inexpensive. In giving this evidence he was unaware of any previous incidents or accidents involving the use of the steps. Nor was any evidence given by Mr Downey of the application of the practice in broadly similar or comparative circumstances.

Defendant's Case

12. The school principal, Ms Sweeney, gave evidence that she had taught at the school since 1984, becoming principal in 1991. Her belief was that the steps had been constructed at the same time as the school in 1956. She confirmed that the steps were heavily trafficked on a daily basis during the school year. Notwithstanding, during her time as a teacher and principal, she was unaware of any complaint about the steps or of any accident involving a slip, trip or fall or for that matter any other accident thereon. The Defendant had implemented a safety policy. There was a written safety statemen and risk assessments/ inspections were carried out at least once a year using a template form; she had not been notified and was unaware of any safety issue arising with regard to the steps from these assessments.

13. It was also school policy to keep an accident log book. To her knowledge no accidents or incidents involving the steps had been recorded in the book at any time during her tenure in the school; this in circumstances where on average 300 students were enrolled each year. She remembered the day of the accident and attended on the Plaintiff. Ms Sweeney also gave evidence that not all students used the steps to enter or leave the school premises. In this respect she referred to the side entrance and path which leads to the buildings housing the senior infant classrooms. The Plaintiff could have used this means of access to and egress from the premises. I digress here to observe that it had been pleaded in the defence that the Plaintiff was guilty of contributory negligence in failing to use this entrance and pathway, however, that case was not pressed during the trial.

14. Evidence was also given by Ms Kirby, Deputy Principal of the school at the time of the accident; she ceased working there in 2019. As such she was responsible for health and safety. She had attended health and safety courses and seminars. She regularly received information on health and safety issues by way of updates from a number of interested bodies, including the Primary School Principal's Network through which she had also received safety updates. With regard to the accident circumstances she corroborated Ms Sweeney's evidence that an accident log book was maintained, a written safety statement was in place and an annual risk assessment was carried out by her during which she was habitually accompanied by the school caretaker, Mr Kennedy. The steps *in quo* were identified as part of the risk management documentation. Potential hazards, such as ice in Winter or leaves in the Autumn were identified, as were remedial measures; the former being dealt with by the application of salt and the latter by removal; fitting handrails was not identified or considered.

15. Ms Kirby came on the accident when the Plaintiff was being put on a stretcher prior to being placed in an ambulance parked at the main entrance gates. She spoke with the Plaintiff and asked her what had happened. The Plaintiff's response was that she did not

know what had caused her to fall. In the absence of an explanation for the fall Ms Kirby carried out an inspection of the steps; she satisfied herself there was nothing visible to explain the accident. With regard to internal safety measures, she gave evidence that internal steps/ stairs have nosings or yellow strips to highlight the edge of each step. Steps and stairs in the school buildings were all fitted with handrails, however, she never considered markings or nosings for the steps *in quo* nor did she consider fitting handrails. Indeed, even after the accident she did not think it necessary that the steps should be fitted with railings; the steps remain un-railed.

Submissions

16. The kernel of the submission on liability made on behalf of the Defendant by Mr Condon S.C. is that there was no evidence on which to found a conclusion that there was causative negligence on the part of the Defendant in the occurrence of the accident. The Defendant's duty was to take reasonable care to ensure that the premises were reasonably safe for use by lawful visitors, including the Plaintiff; there was no evidence to sustain a breach of that duty. If anything, the steps were compliant with the law in that they were not in breach of any statutory regulation in force at the time of the accident; there was no statutory requirement that the steps be fitted with handrails. What may or may not have happened had rails been fitted amounted to speculation and was thus to be avoided by the Court.

17. On behalf of the Plaintiff, Mr O'Donnell S.C. submitted that in circumstances where all internal stairs and steps within the school premises were railed it was common sense that the steps *in quo* should also have been railed. The only expert evidence available to the Court was that offered by Mr Downey on behalf of the Plaintiff and in his opinion handrails ought to have been fitted. Moreover, it was clear from the evidence of Ms Kirby in particular that the question of handrails had not been considered and had thus been overlooked in any risk assessment. Irrespective of what caused the Plaintiff to lose her footing the absence of the handrails compounded the situation in which she found herself and was thus causative. Finally, with regard to the allegations of contributory negligence, the onus of proof lay with the Defendant. No evidence had been led or extracted on cross-examination to sustain the plea; accordingly, the Plaintiff was entitled to succeed in full.

Decision: The Law

18. The case advanced at trial is essentially one concerned with the static condition of the premises. The breach of statutory duty alleged in this respect is founded upon the provisions of s. 3 of the Occupier's Liability Act, 1995 which provides*, inter alia*, for the duty of care owed to lawful visitors by an occupier of premises. Section 1 defines "*visitor*" as meaning:

> *"(a) an entrant, other than a recreational user, who is present on premises at the invitation, or with the permission, of the occupier or any other entrant specified in paragraph (a), (b) or (c) of the definition of "recreational user",*
>
> *(b) an entrant, other than a recreational user, who is present on premises by virtue of an express or implied term in a contract, and*

(c) an entrant as of right,

while he or she is so present, as the case may be, for the purpose for which he or she is invited or permitted to be there, for the purpose of the performance of the contract or for the purpose of the exercise of the right, and includes any such entrant whose presence on premises has become unlawful after entry thereon and who is taking reasonable steps to leave."

19. The duty owed by an occupier of a premises to a visitor as defined by the Act is set out in s. 3 (1) which provides:

"(1) An occupier of premises owes a duty of care ('the common duty of care') towards a visitor thereto except in so far as the occupier extends, restricts, modifies or excludes that duty in accordance with section 5.

(2) In this section 'the common duty of care' means a duty to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to exercise over the visitor's activities) to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon."

20. While the duties, liabilities and rights which attached by virtue of the common law to occupiers of premises in respect of dangers existing thereon have been replaced by the duties, liabilities and rights provided for by the Act of 1995, it is s abundantly clear from the wording of s. 3 that as was the case at common law the occupier is not an insurer for the safety of lawful visitors while using a premises. While it is common case that there is no statutory regulation requiring the steps *in quo* to be fitted with handrails it does not follow that there was no obligation to do so. In circumstances where there are several very precise and extensive regulations dealing with the provision of handrails the absence of a regulation imposing an obligation to fit hand rails to external steps constructed separately and apart from a building while a material consideration to be taken into account by the Court when considering whether there has been a breach of the common duty of care, is not determinative thereof.

21. In determining the issue the Court must also take into account the particular circumstances of the case presented which in this suit includes the absence of any evidence of a recorded complaint or accident involving a slip, trip, fall or other mishap on the steps at any time prior to the date of the accident notwithstanding the period of time which has elapsed since construction and the heavy use to which they have been put during the school year. It is well settled that in determining whether there has been a breach of the common duty of care the Court is required to apply an object the test to the facts and circumstances which existed prior to and were known or ought to have been known to the defendant at the time of the accident but to the exclusion of those matters either not known or not reasonably ascertainable prior to the commission of the wrong

and only became known or reasonably ascertainable with the benefit of hindsight. Nor does it follow from the continued absence of railings in the circumstances of this case that there was no breach of the common duty of care by the Defendant.

22. The drawing of inferences or reaching conclusions in relation to the steps *in quo* by the analogical application of statutory regulations enacted to provide for the safe use of internal steps and stairs or steps and stairs providing immediate access to and egress from a building does not follow either as a matter of law or logic. Any such application must, in my judgment, be approached with great caution, particularly when regard is had to the objects of the Safety, Health and Welfare at Work Act, 2005 in general and the scope of parts K and M of the Control of Building Regulations, 1991 as amended, in particular. Given the comprehensive nature and purpose of the 2005 Act and the 1991 Regulations as amended, it seems to me reasonable to conclude that the absence of a requirement to rail external steps extraneous to a building is not the result of oversight.

23. While I am conscious that the only expert evidence is that of Mr Downey, whose opinion was that it would have been good practice to have retrofitted handrails on both sides of the steps, it is not insignificant that no evidence of the practice in broadly similar circumstances or otherwise was adduced. I would have thought that if the fitting or retrofitting of hand rails to external steps not covered by the regulations was good practice, and accepted as such, evidence thereof would have been led. There is none such. The Defendant had a safety policy; it had a written safety statement on foot of which risk assessments of the premises, including the steps *in quo*, were carried out at least once a year. An accident log book was maintained; no prior complaints, accidents or other mishap involving a fall on the steps is recorded or otherwise known to have occurred.

24. In my judgment the fact that the provision of handrails was either not considered or, as portrayed on behalf of the Plaintiff, was overlooked cannot be divorced from the overall factual matrix already mentioned which existed prior to and at the time of the accident known to or as ought to have been known to the Defendant all of which as the occupier it was entitled to take into account when considering the common duty of care owed to visitors, including the Plaintiff, and how best that duty was to be discharged within reason. On my view of the evidence, particularly against a background where the static condition of the steps was not alleged to have caused the Plaintiff to lose her footing and was unlikely to have been the cause of a slip or trip and fall, the retrofitting of handrails would amount to a council of perfection, even though the fitting of rails would have been relatively simple and inexpensive.

Conclusion

25. This judgment is not to be taken as laying down a general rule of law or proposition that an occupier is not required to fit or retrofit hand rails to external steps constructed separate and apart from a building; there may well be other circumstances in which such a precaution ought reasonably to be taken. Suffice it to say for the reasons given that in all the circumstances of this case I am satisfied, and the Court finds that there was no breach by the Defendant of the common duty of care owed to the Plaintiff. The law does

not require the Defendant to guard against possibilities rather the duty is to guard against that which is reasonably foreseeable and likely to occur as a result of the Defendant's acts or omissions.

26. The onus of proof is on the Plaintiff to establish the case made at trial on the balance of probabilities. I am not satisfied on the evidence that she has discharged the burden placed upon her by the law, specifically, I am not satisfied in the circumstances that the absence of handrails amounted to causative negligence of the event in respect of which she brings these proceedings. If there had been a handrail the Plaintiff may or may not have grabbed hold of it; she says she would have reached out and that she so reacted, however, there is no evidence she would have caught hold of a rail or that if she had managed to do so she would have been able to arrest her fall either wholly or in part; she may or she may not. She may have minimised the injury sustained, or she may not. While these are all undoubtedly possibilities, any consideration thereof in the absence of evidence would involve the Court entering into the universe of speculation, a journey on which it may not embark and place where it must not go.

27. In reaching these conclusions I am mindful of the serious injury sustained by the Plaintiff and the consequences which these have had and continue to have for her, moreover, I consider it appropriate to add that I found her to be a wholly decent and genuine witness who gave her evidence in a straightforward and truthful manner. I do not doubt her belief, particularly given what happened to her, that a handrail would have made a difference to the accident. Trying to prevent herself from falling by reaching out to try and grab hold of something is a perfectly natural and understandable reflex reaction. However, having regard to the evidence of Ms Sweeney and Ms Kirby, which I accept, an impartial application of the law to the facts found and conclusions reached does not, at least in my judgment, warrant a finding of negligence or breach of the common duty of care and consequential liability for the accident.

Ruling

28. Accordingly, and for all of these reasons the Court is required to dismiss the action and will so order.