

THE HIGH COURT

BETWEEN

AWN SHELTON

PLAINTIFF/APPELLANT

-V-

LENA CREANE AND THE ARKLOW URBAN DISTRICT COUNCIL

DEFENDANTS/RESPONDENTS

Judgment of Mr. Justice Lardner delivered the 17th day of December 1967

This is a claim by the Plaintiff/Appellant for damages for personal injury. The first Defendant lives at No. 60 Marian Villas, Arklow - a house which she holds as weekly tenant to Arklow Urban District Council who constructed the house as one of a housing estate some years ago. A concrete footpath leads from the gate on the road to the front door and also around the side of the house and partly along the back of the house to the back entrance. Close to the rear corner of the house and in the surface of the footpath there was what has been described as a standard metal cover for an armstrong junction in drains lying immediately beneath. This metal cover is described as light - about half a pound in weight and it rests upon and fits into grooves in the aperture giving access to the armstrong junction beneath. The metal cover and the aperture beneath are about eleven and a half inches square. When the cover is removed the aperture beneath is about twelve inches deep. There is no allegation that when in position this metal cover is not perfectly

safe and adequate for anyone using the path.

On the 21st of September 1985 the Plaintiff who lives nearby (having arranged with the first Defendant that she would keep an eye on the first Defendant's four children, aged fourteen, ten, five and four while their mother was out) went to No. 60 Marian Villas after dark and walked along the concrete path to the kitchen door at the rear. As she turned the corner at the back of the house her foot went down into the aperture of the uncovered armstrong junction and she suffered injury. The Plaintiff's evidence was that the metal cover over the aperture had been removed and was no where to be seen and that in the dark she had not seen the uncovered aperture in the footpath.

As against the first Defendant who was sued as occupier the Plaintiff claimed to be an invitee and that the first Defendant was negligent in having failed to protect her from an unusual danger of which she knew or ought to have known, namely, the uncovered aperture in the footpath. I find the Plaintiff was an invitee and the aperture was a trap or unusual danger.

The Plaintiff's evidence was that the metal cover was so light it could easily be removed by a child and that all the children on the estate used to take this type of lid off. There was also evidence that the missing lid or cover was found the next day some distance away in a field. For the defence there was evidence that this was a standard armstrong metal cover which was widely used on building estates in Ireland during the past thirty years. Mrs. Creane said she had never seen this cover off or removed before and she had lived in the house for several years. She did not know who had removed it.

Mr. Seamus Ryan, an assistant engineer employed by Arklow Urban District Council, said that in over sixty years' experience there

had never been any complaint relating to these metal covers on the Urban District Council housing estate. Mr. Ciaran Fahy, consultant engineer, agreed that these were standard covers for this type of aperture and in his experience designing hundreds of houses he had never specified or seen lockable covers in use except in places to which the public had resort or access.

Having considered the evidence I am not satisfied that the uncovered aperture on the 21st of September 1985 at No. 60 Marian Villas was something of which the first Defendant had knowledge or ought to have known of. I think it was something altogether exceptional which had never occurred before. I do not find that she was guilty of any failure to take care in regard to this cover.

The claim against the Urban District Council was essentially that as the builders and providers of the house, they owed a duty of care not only to the occupiers and their family but also to all visitors such as the Plaintiff and that the provision of the light metal cover as in this case which was capable of being removed by children and had no locking device was a breach of that duty amounting to negligence. The Civil Bill avers that at all material times the second Defendant was the owner of this house and exercised control over it. The former averment is not denied in the defence but the latter is put in issue.

It seems to be common case that Arklow Urban District Council constructed and provided this and other houses on this housing estate under statutory powers and authority. The questions I must decide are whether they owed a common law duty of care to the Plaintiff in the circumstances of this case and whether that duty was breached.

In an unreported decision delivered on the 26th of April 1985 in a case entitled Denis Ward and Ann Ward -v- Patrick McMaster, Loc

County Council and Nicholas Harvey Costello, Justice, said at pages 26 and 27

"When deciding whether a local authority exercising statutory functions is under a common law duty of care the Court must firstly ascertain whether a relationship of proximity existed between the parties such that in the reasonable contemplation of the authority, carelessness on their part might cause loss. But all the circumstances of the case must in addition be considered, including the statutory provisions under which the authority is acting. Of particular significance in this connection is the purpose for which the statutory powers were conferred and whether or not the Plaintiff is in the class of persons which the statute was designed to assist. It is material in all cases for the Court in reaching its decision on the existence and scope of the alleged duty to consider whether it is just and reasonable that a common law duty of care as alleged should in all the circumstances exist."

Applying these principles with the statement of which I respectfully agree and having considered the relevant sections of the Housing Acts, I am not satisfied that the Plaintiff simply as an invitee or visitor was within the class of persons which the statute was designed to assist.

No submission has been made nor has any argument been directed that quite apart from the position as the exercisers of statutory powers, the second Defendants are on the principle of Donoghue and Stevenson under a common law duty to take care for the safety of

persons such as the Plaintiff who are visitors to a house which they own but which is held by a tenant under a tenancy agreement. In these circumstances I am not disposed to consider or decide that question. However, I feel bound to say that even if such a duty of care did exist the evidence which I have heard falls far short of satisfying me that the second Defendants ought reasonably to have foreseen that the metal cover over the drain or gully might be removed and thereby create a risk of injury to a person such as the Plaintiff. I therefore dismiss the Plaintiff's claim against both Defendants.

Approved.
G. Lander