[2020] IEHC 453

THE HIGH COURT

[2018 No. 8735 P]

BETWEEN

MARY DELANEY

PLAINTIFF

– AND –

CIRCLE K IRELAND ENERGY GROUP LIMITED (FORMERLY TOPAZ)

DEFENDANT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 30th day of July, 2020

1. Authorisation under s. 32 of the Personal Injuries Assessment Board Acts 2003 and 2007 was granted to the plaintiff to bring the within proceedings on the 26th September, 2018 bearing Authorisation Number PL10032017631552. The plaintiff is 61 years and is a mother and grandmother and is in receipt of a disability benefit. She resides at Castlecomer Road, Co. Kilkenny. The accident, the subject matter of these proceedings, occurred at, what was then known as, "Topaz Filling Station", Castlecomer Road, Kilkenny when the plaintiff was a visitor for the purposes of the Occupiers' Liability Act 1995 ("1995 Act"), at the said premises. The said premises is now known as Circle K Ireland Energy Group Limited.

The Plaintiff's Evidence

2. The plaintiff gave evidence that on or about the 20th May, 2017, when she was lawfully present at the said premises and walking across the forecourt of same, carrying a purse underneath her left arm with milk and a roll of bread in her hands, that her right foot was caused to catch on a lip on the ground and that she fell down with her face and head facing downwards, dropping the items she had been carrying. She described wearing a pair of black laced shoes on the occasion of the accident. The plaintiff informed the court that a man came to her assistance and telephoned her daughter, Lisa, asking her to come and help the plaintiff.

3. The plaintiff gave evidence to the effect that she was taken to the Accident and Emergency Department of St. Luke's Hospital, Kilkenny where a plaster cast was applied to her left ankle fracture. Difene and Ibuprofen were prescribed. The plaintiff described her face as being "black and blue" and suffering a sore nose that recovered after one week. She also described suffering two broken teeth, which require her to wear a black band coming at the top of the teeth as these teeth are dead despite treatment and she does not have the option of having crowns fitted. She also said that her upper lip was bleeding at the time and that she was left with visible scarring and a slight tick in her lip which occurs once a week. The plaintiff gave evidence of having to use a straw in order to drink liquids for a couple of weeks following the accident and she said that, even now, she would not be able to eat an apple because of increased sensitivity around the teeth. The plaintiff also said that she suffered from bruising and soreness of her left shoulder.

4. The plaintiff sought physiotherapy in St. Luke's Hospital, Kilkenny and, after two sessions, was given exercises to do at home and she has undertaken these exercises. The plaintiff informed the court that as a result of this accident, where previously she had been able to walk fifteen minutes into the centre of Kilkenny and fifteen minutes back to her home,

she cannot now do that and can only do half of that amount either walking in and getting transport home. In the evening times, she suffers from swelling in the ankle and will require more physiotherapy. She has, what is described as, an antalgic gait and has not got full movement in her left foot – it suffers from stiffness as a result of this accident.

5. This accident, the plaintiff claims, has impacted on her life, causing her to have to move apartment and she is hopeful of obtaining an apartment on the ground floor. At the time of the accident, she was minding her grandchildren three days a week but, because of the prolonged recovery period she experienced, her children had to make alternative arrangements for the care of the grandchildren and she felt then that, at a certain point, it would not have been fair to them or to the grandchildren to change the arrangement they now had.

6. The plaintiff was asked about her disability benefit and how that arose and she explained that she had worked in shops when she was younger which involved standing all day and that she stopped working 32 years ago when she was pregnant with her first child and that, ten years ago, she obtained a disability allowance. In the intervening years, she described, however, how she had fostered no less than eight children and had run a crèche with other people but she was not able to stay standing for a whole day. It should also be noted that the plaintiff gave evidence that she had surgery on her left leg when she was fourteen years of age. She has a scar from the operation on her leg at fourteen years of age and she could not stand because of it.

7. Under cross-examination, the plaintiff recalled seeing the gully, being conscious of falling forward, feeling that the grid on the ground was coming up to her face as she fell and being afraid she was going to hurt herself "really badly". She recalled receiving a great shock as a result of the fall. The plaintiff also noted that she did not fall near the concrete gully because, otherwise, she would have fallen out onto the footpath. She identified her fall as taking place near the side of the entrance proper to the facility where she gave evidence that she encountered a lip at a tarmacadam patch which caused her to trip and fall.

Evidence of Mr. Jack O'Reilly, Chartered Engineer

8. Mr. O'Reilly provided photographic evidence and, in his Photograph 2, it shows a joined line of a repaired surface. Photograph 4 shows a tape measure resting on the new tarmacadam ledge and he said that, from new to old surface, there was twelve millimetres of height. Photograph 7 showed fourteen millimetres or approximately half an inch. He noted chippings on the surface forming bubbles. Mr. O'Reilly was of the opinion that this ledge provided a trip hazard and that there was protruding chipping, that the patch was laid down recently and the defence confirmed that the exact period was four months prior to the accident.

9. Mr. O'Reilly contended that fourteen millimetre difference in height was not acceptable and he said that a neat square was clearly cut out and a two-inch depth of excavation took place and he said it should have been packed to be level and flush but that excess material was used in the reinstatement. He found that there was defective workmanship

and that it was especially obvious in the difference in the level, which had potential to cause hazard. Mr. O'Reilly said, in his photographs, Photograph 7 showed a surface and a granular quality of same and he said a flat shoe against a very granular surface will cause a trip hazard and that the resistance of the chips plus the height of the lip together formed the trip hazard.

10. In terms of negligence, he said there was simply too much material rolled in, leaving the surface fourteen millimetres higher than the surrounding surface and that this happened at the reconstruction phase. He said it would be normal to assume a joint should be level.

11. He referred to the Guidelines for Managing Openings in Public Roads (April 2017), this material was presented late to the other side and the court did not find it to be directly relevant but rather was offering comparison and the defence objected to the fact that it was produced so late if it were to be relied on. The court felt it should disregard that portion of evidence.

12. Under cross-examination, Mr. O'Reilly was asked if the left hand square was vertical, that that would be an edged depression and he said he agreed with that but here the reinstatement surface was higher and therein lay the problem. He said surface crowning was not the same as what happened here and was not analogous to what we had. He said it was not a slope up, rather, a lip up and that it was not quite vertical but it was an improper laying of tarmacadam in the first place and it was not remotely similar to surface crowning. He said that there were protruding chippings which also caused a trip hazard and he said it is absolutely common sense that parity of surface level be achieved. Mr. O'Reilly was adamant that, had the reinstatement been properly carried out, there would be no difference in the level between the old surface and the reinstated surface and he referred to the use of the word "level" with regard to the ordinary meaning of that word. He thought that what had probably happened had been the excessive use of tarmacadam to ameliorate the situation concerning the ledge.

13. In his conclusion, in which he reiterated the above points, he also stressed that the existence of the lip on this patch appeared to him to be in breach of the Occupiers' Liability Act 1995 on the part of the defendant.

Evidence of Mr. Seán Walsh, Consulting Engineer for the Defence

14. Mr. Walsh was of the view that the work itself was satisfactory concerning the particular patch, which the two engineers had inspected jointly, but he said there was a failure to match the level. Mr. Walsh also made the point that, with reference to his Photograph 5, he said the plaintiff stubbed her foot but he said people can trip and fall on flat surfaces, for example, a missed step. He said, with reference to his own Photographs 5 and 6, the area at the left of the tape measure was better but that to the right of the tape it was much worse. Mr. Walsh said that the public footpath is a tarmacadam footpath that is presented in medium to poor condition generally. It has a drainage channel running across the gateway opening with a gully grating towards the southern end. He described Photograph 7 as showing the greatest difference in level between the two surfaces. His evidence was to effect that the difference in level is 0.8 inches but he argued that it was

not a question of a lip and it was a gradual rise occurring. Mr. Walsh made the point that normally we are measuring a vertical lip, but he argued that there was none here, rather, a gradual slope upwards and he fundamentally disagreed with Mr. O'Reilly contending that there was a lip, whereas, he said no, it is a changing gradient and that changes may arise from the terrain itself and that it was a very common feature, and he argued that there is no such thing as a flat surface. He made the point that a lip is a recognised hazard, whereas, changing in gradients are not. He said you could criticise that there was an element of crowning in terms of the aesthetics and drainage by millimetres. He said that even if there was crowning, more than was necessary, there were no health and safety implications arising from that. He said that tar, from a watering can, can have an overspill that does not matter because it is hot sticky material and it is a standard reinstatement bar crowning which he said was very high for this piece. Mr. Walsh said that the maximum difference between the levels was 20 millimetres. Mr. Walsh said he could not say how the plaintiff stubbed her toe.

Medical Reports

15. Medical reports were agreed and handed in; the medical report of Dr. Richard Carroll dated the 30th August, 2017 stated, in relation to the plaintiff's injuries:

> "[The plaintiff] *had oedema on the left side of her ankle which was painful to touch. Her face showed no nasal deformity but some haematoma was present. She had some oedema of her nose. She had some excoriation in the upper lip area and both middle upper teeth were painful to touch with some swelling of the surrounding tissues. She was referred for x-ray of her left ankle, right knee and nose and dental assessment was also advised due to the tooth impaction as a result of the fall*."

16. The report further stated that at the Accident and Emergency Department of St. Luke's Hospital, the plaintiff underwent an x-ray of the facial bones and right knee which did not demonstrate any bone injuries. The x-ray of her left ankle showed a fracture of the left lateral malleolus. This was described as an un-displaced Weber A type fracture. The plaintiff was managed with analgesic (pain relief) medication and her left ankle was put in a back slab cast whilst she was referred for orthopaedic clinical assessment. Sulfidine and Difene medication were prescribed. The plaintiff was reviewed on the 26th June, 2017 and was in a walking boot at that time. She had still a lot of swelling in the ankle region and was very stiff with poor range of movement. She was seen in the fracture clinic and the fracture was deemed to be healing well. The Locum Consultant Orthopaedic Surgeon who saw her noted that she had pre-existing deformity of the tibial region following a surgery some 40 years previously. The plaintiff was seen on the 28th August, 2017 for assessment and she had a walking boot for six weeks with two crutches at that stage and she had only in the previous two weeks been mobilising with no crutch and this was very inconvenient for her living as she lived in an apartment up two flights of stairs. She was more or less housebound for quite a while. She said she still had bruising around the right knee and she had hit her two front teeth heavily in the accident, suffering a fracture to the left front tooth and was having ongoing root canal treatment to both front teeth which were still very sensitive causing her to eat from the side of her mouth and she was unable

to bite with the two front teeth. Scar tissue was obvious above the upper lip region in the midline.

17. Extensive treatment regarding her dental injuries furnished by REVA Dental and this involved at least nine visits to the dentist. The necessity going forward, two crowns at a cost estimated at €650.00 each. Root canal treatment was administered over the various appointments with a reduction of symptoms as of the 21st September, 2017.

18. Mr. Petr Jemelik, Consultant Orthopaedic Surgeon in Waterford, reviewed the plaintiff and confirmed orthopaedic treatment as set out above. The plaintiff was discharged from the clinic in July, 2017. She was described as having pain and stiffness with long distance walking and no aggravation of a pre-existing condition and, on examination, on the 26th February, 2018, she was found to have a free range of movement on examination with 15° of dorsi-flexion, 40° of flexion, full stability medial and lateral and just minimal local tenderness around the lateral malleolus. There was no clicking, no locking and no swelling at that point. X-rays on the 9th June, 2017 showed a healed fracture of the lateral malleolus Weber A in good alignment. At that stage, the consultant felt that she would feel some limitation and stiffness for another three to five months but she would gradually improve regarding the pain and stiffness. A full recovery post-ankle fracture is up to twelve months post initial injury.

19. Smiles Dental provided a report dated the 16th May, 2018 for the Personal Injuries Assessment Board. It gave an estimated porcelain crown replacement at €800 per tooth each with an anticipated replacement between ten and fifteen years. This report noted that a common result of such trauma is nerve death of the teeth requiring root canal treatment as was the case here. This report also confirmed that internal bleaching was carried out by the treating dentist subsequent to completion of the root canal treatment to improve the colour of the teeth and also confirms the scar on the upper lip which resulted from the accident and a feeling the plaintiff had of "nerve hopping" from the scar a few times a week.

Report of Mr. Robert Din, Consultant Orthopaedic Surgeon

20. Mr. Din provided two reports to the court, dated the 26th May, 2018 and a subsequent report dated the 5th June, 2020. In 2018, Mr. Din felt that the plaintiff had a mild antalgic gait with swelling in her ankle most days and she said that the left ankle is stiff compared to the right ankle and she has difficulty climbing and descending stairs due to the left ankle pain and that she had no complaints regarding her left knee or left hip. He noted how the plaintiff described her teeth being quite sensitive and that she had some mild difficulty biting due to sensitivity of the upper front tooth.

21. He found some swelling over the lateral malleolus and the range of movement of the ankle was restricted at that date in terms of dorsi-flexion at 35° and plantar flexion at 45°. The plaintiff was found to have a full range of motion of the subtalar, midfoot and forefoot joints. In terms of opinion and prognosis, at that stage, she was found to have residual stiffness in the left ankle and would require ongoing physiotherapy to same over

a six to twelve-month period but he anticipated a full recovery to pre-injury level of function with regard to the left ankle injury.

22. Soft tissue injuries to the mouth and teeth were likely to resolve over the following six-month period.

23. The plaintiff was found, in Mr. Din's second report, to have an antalgic gait that she done poorly following the high injury to the left ankle and soft tissue injuries to the mouth in that she has residual stiffness in the ankle and will require ongoing physiotherapy to the left ankle for the next twelve to eighteen months. This report anticipated the plaintiff dealing poorly from her left ankle fracture in view of persistent stiffness within the ankle and that she might be left with permanent stiffness in same, post physiotherapy, and that she has a small risk of posttraumatic arthritis of the left ankle in the region of 5 to 10% at five to ten years post-injury. He gave her a fair prognosis. The antalgic gait continued as well as some swelling over the lateral malleolus and he said that, at this stage, the range of the ankle is restricted on dorsi-flexion at 40°, plantar flexion at 60° and she was found to have a full range of motion of the left subtalar, midfoot and forefoot joints and the left foot was found to be neurovascularly intact.

Findings of Fact and Application of the Law

24. The court has noted that there are articles of agreement signed on the 26th January, 2017 between Topaz Energy Limited and a third-party herein. The court was informed that this accident occurred post the said agreement. The third-party were not able to take part in the proceedings at this stage due to the Covid-19 restrictions. There is no doubt in the mind of the court having heard all the evidence relevant to the matter and having carefully considered same that there was a trap point of reinstatement where the plaintiff fell. There was a joint inspection carried out and in reality there is not a huge difference between the position of both engineers save on one main issue. The reality of the case is that the plaintiff was at all material times a visitor at the defendant's premises in accordance with the definition provided in s.1 of the Occupiers' Liability Act 1995. She was entitled to proceed with safe entry to and egress from the said premises. The reality of the case is that, on the balance of probabilities, from the engineering evidence, there was too much filled bitumen put into this reinstatement operation and a patch of tarmacadam identified was in all probability provided as a repair of pre-existing defective surfacing when the forecourt had been recently refurbished. There was a lip extending across the width of 1950 millimetres. The plaintiff's engineer noted that this arose by virtue of the fact that fresh black tarmacadam rises above the pre-existing tarmacadam by a height of approximately fourteen millimetres along the joint line and he notes that, in his evidence, while the difference in height is not entirely vertical, the lip includes projecting small chippings which would have the effect of stopping a person's foot and he further noted in his evidence that the plaintiff was wearing a black laced shoe and that that would stub against the chippings. It is quite clear examining all of the photographs that the lip arises due to the placing of an excessive depth of material in the patched area and it is a reasonable expectation that the level of the fresh surface and the pre-existing surface should be achieved as even. Incorrect workmanship was clearly at fault because

this is quite a definite tripping hazard which has resulted. The fourteen millimetre height difference was, in the opinion of this Court, sufficient to present a trip hazard. The court notes the decision of Charleton J. in *Allen v. Trabolgan Holiday Centre Ltd*. [2010] IEHC 129, where Charelton J. pointed out the necessary care that should be taken in relation to the maintenance and care of a footpath which had accumulated mud. Charleton J., at para.11, stated:

> *"What care is reasonable in the circumstances depends to a large extent on how visitors could reasonably be expected by the occupier to behave on the premises…Perfection is not called for, simply reasonable care. That would have been present had there, perhaps, been extra gravel on the path or had the path been tarmacademed across with an appropriate surface that provided grip or otherwise treated so that water could run down the slope without the accumulation of mud."*

25. In the view of this Court, it is reasonably foreseeable that a person such as the plaintiff would suffer such an accident in these circumstances as there was a lack of reasonable care in the reinstatement of the pavement. The patch in question forms a distinctive raised surface and raised in an uneven way as was amply demonstrated by the engineers. I do not accept the evidence given that the difference in level takes the form of a slight gradient. It would describe it as rather distinctive.

26. The court assessed the plaintiff as a reasonable individual and, although she obtained a disability allowance ten years, gave evidence of fairly significant periods of work undertaken by her at different times in her life. She came across as a credible witness and did not exaggerate her symptoms in any way. The medical reports were handed in by agreement.

27. The court was addressed and reference was made to a number of decisions on trip and fall accidents which were produced by this Court, but it was pointed out that it was very much felt that this case turned on its own facts (note that reference was made to *O'Toole v. Tipperary County Council* [2018] IEHC 447; *Hampson v. Tipperary County Council* [2018] IEHC 448; *Furlong v. Wexford Borough Council* [2018] IEHC 450; and *Kearney v. Tipperary County Council* [2019] IEHC 242). An implicit reference was made to *Hampson v. Tipperary County Council* [2018] IEHC 448, a case in which this Court assessed a similar situation but did not find in favour of the plaintiff. In *Hampson*, the plaintiff claimed to have suffered injuries after falling as her foot had become trapped in a large hole between two concrete kerbs. In comparison to the factual scenario that arose in this case, the court did not find the plaintiff in *Hampson* to be reliable as there was a prolonged period before seeking medical treatment after the accident, there had been no recent repairs to the pathway and the court did not find that there was negligent construction of the footpath. These findings are in marked contrast to the factual scenario that was put to the court in this case.

28. Reference was also made to the decision of Cross J. in *Loughrey v. Dun Laoghaire County Council* [2012] IEHC 502. That case concerned subsidence and refers to a sloped area and

to the conclusion in the circumstances as evidenced by the accident itself that there was a hazardous differential of between 5mm and 6mm which was found in that case to be a tripping hazard to the plaintiff and a sort of hidden danger or trap which enabled the plaintiff to be entitled to succeed without any contributory negligence against the defendants.

Quantum

29. The plaintiff suffered facial injuries as set out above with bruising and residual irritation over her upper lip. She suffered an injury to her left ankle as set out in the above medical reports. She suffered injury to her right knee and teeth injuries which require continuous treatment with nine visits to the dentist necessary and indicated to the court that she will probably have to have two crowns fitted which are deemed appropriate further treatment should she desire same. The report of Mr. Robert Din of 5th June, 2020 gives a poor outcome for her high energy injury of her left ankle and soft tissue injuries to her mouth. She has residual stiffness in the ankle and he envisages twelve to eighteen months' further treatment including physiotherapy but with the possibility of persistent stiffness in the left ankle. He gives her a small risk of posttraumatic arthritis in the left ankle between 5 and 10% in five to ten years' post-injury and just gives her a fair prognosis. The court has taken into account the fact that the plaintiff had worked at different stages throughout her life and could not resume minding her grandchildren due to the passage of time and ongoing recovery and had to seek alternative accommodation due to the impact her injury had on her ability to climb stairs to her apartment.

30. In all the circumstances, I think there has been significant medical sequelae as set out in the medical reports which I accept fully and consider that €70,000.00 be appropriate sum by way of general damages and the multiplicity of sites of injury as well as the significant fracture and the risk of now healed but with the ongoing stiffness issue and in suffering to date. Some consideration in this figure is given to the fact that a further period of time with no guarantee of full recovery is envisaged. Items of special damage are agreed at €1,770.00 giving a total figure in the sum of €71,770.00.