

THE HIGH COURT

[2022] IEHC 19

Record No. 2016/3562P

BETWEEN

THOMAS KEEGAN

PLAINTIFF

AND

SLIGO COUNTY COUNCIL

DEFENDANT

JUDGMENT OF Mr. Justice Jordan delivered on the 12th day of January, 2022

1. These proceedings were commenced by a Personal Injury summons which issued on 22nd April, 2016. The plaintiff was born on 27th February, 1968. He resides at 1 McNeil Drive in Cranmore in Sligo. He is a single man and he has one adult child. He did in the past work as a construction worker (a paver) but he was unemployed at the time of the accident which gave rise to these proceedings.
2. The accident occurred on 18th November, 2013. It is the plaintiff's case that he slipped on attempting to enter his home at McNeil Drive and that the cause of the slip was the wet and slippery tiles in the exposed porch. He suffered a serious fracture to his ankle.
3. On the date of the accident the plaintiff was a tenant in the house which was let to him by the defendant as a housing authority, under the Housing Act 1966.
4. The house on McNeill Drive is part of the large housing estate known as Cranmore Estate. Ms. Moran of Sligo County Council explained in evidence that McNeill Drive was built as part of the second phase of the estate in the 1970s. The second phase involved the construction of thirty-seven houses. The first phase had involved the construction of ninety-seven houses. It appears that there were five phases in all so it follows that the number of dwellings provided ran into the hundreds although there was no direct evidence as to the final count.
5. It is the plaintiff's case that the porch and the tiling of the porch created a particular hazard because of the slippyness of the tiles and because of the fact that the porch is orientated to the south/southwest which is the direction of the prevailing wind and rain in Sligo – and all along the western seaboard. The case is made that the open porch was constantly exposed to being wet as a result of the prevailing weather conditions and that this exposure exacerbated the problem caused by the slippery tiles.
6. The case was originally heard in November 2017 at the High Court sitting in Sligo. In a reserved judgment the trial judge found on liability for the plaintiff and found that there was no contributory negligence. He awarded the plaintiff total damages of €105,650.00 – of which €650,000 were apparently special damages. The balance of €105,000 was for general damages, including provision for the continual interference with the plaintiff's employment capacity as a result of the injury.
7. The defendant appealed on both liability and quantum to the Court of Appeal. Judgment in that appeal was delivered on 10th October, 2019. The Court of Appeal decided that it

would not interfere with the award of damages but it did direct that there should be a retrial on the issue of liability.

8. So what has come back before this Court is a trial of the issue of liability.
9. The Court of Appeal did make it clear that the trial judge erred in making a finding that the dwelling house was not reasonably fit for habitation in circumstances where this had not been pleaded. The particulars of negligence in the personal injury summons did include a plea of "failing to comply with the provisions of Occupiers Liability Act 1995 and the Housing Acts 1966". But the plaintiff did not furnish further particulars of the alleged breach of the Housing Acts 1966 although asked to do so in a notice for particulars dated 26th August of 2016. The position is that the alleged breach of the Housing Acts was not part of the plaintiff's case at this hearing and the solicitors for the plaintiff wrote to the defendant's solicitors on 29th October, 2021 indicating that they did not intend to proceed with that argument at this hearing. In that regard Counsel for the plaintiff advised the court that if the plaintiff was to pursue that argument the pleadings would have to be amended and that matter was considered and a decision was made not to amend the pleadings.
10. At the time of the accident the plaintiff had been a tenant of and resident in the house for approximately nine years. The letting agreement dated 7th May, 2004 was proved in court.
11. Clause 14 of the letting agreement provides that: -

"The tenant shall not execute any addition, alterations, improvement or other works in, or in relation to, the dwelling or erect any shed, garage out office or other building, without the consent of Sligo Borough Council."
12. It is clear that the defendant did retain a degree of control over the premises including the porch area and the tiles in that area. For example, the plaintiff would have required the consent of the defendant to change the tiles to concrete or something else.
13. In the circumstances the plaintiff asserts that the defendant was an occupier in relation to the premises within the meaning of that word as set out in s.1 of the Occupier's Liability Act, 1995.
14. It is also asserted on his behalf that the plaintiff was attending at the premises and entering the premises as of right because he was then a lawful tenant of the defendant and that he was therefore a visitor in relation to the premises within the meaning of that word as set out in s.1 of the 1995 Act.
15. If the defendant was an occupier of the premises and if the plaintiff was a visitor then the defendant did owe a duty of care to the plaintiff under the Occupier's Liability Act of 1995. The Act is dealt with in greater detail later in this judgment.
16. In *Allen v. Trabolgan Holiday Centre Limited* [2010] IEHC 129, Charleton J stated:

“As to that duty, it is clear that merely establishing that an accident occurred on premises is not enough. The plaintiff must show that a danger existed by reason of the static condition of the premises; that in consequence of it he/she suffered injury or damage; and that the occupier did not take such care as was reasonable in the circumstances to avoid the occurrence”.

17. The focus of the running of the case was on the allegation that the tiles were slippery and unsuitable for the particular application and thus constituted a danger which caused the injury. The court for that reason considers it best to first deal with the case thus made and the evidence adduced – and assuming for the moment that the defendant did in fact owe the duty of care contended for by the plaintiff.
18. In evidence the plaintiff identified his porch with the tiles in situ and he confirmed that it was facing south/southwest. He said the mosaic tiles in the porch were there since he took the property in 2004. Over the years he would have exterior mats covering the tiles (in part). At the time of the accident he had a mat in the porch – a rubber mat. According to the plaintiff the tiles were always very slippery when they were wet and he said that he did report this problem – although he was not sure or could not remember their names with certainty he thought there was a Sinéad and a Kay to whom he had complained.
19. According to the plaintiff he asked Dessie McGarry to move the door to the front of the porch when new windows and doors were being fitted. The plaintiff said that he would have been happy if the porch had been concreted over. He said he had not asked them to do so directly although he could not really remember now. Speaking once more of the fitting of the windows and doors the plaintiff recollected meeting the window fitter and Dessie McGarry – or Noel Meehan. He recollected asking Noel Meehan to put the door to the front as he said he wanted the new door flush with the front of the house. This would have enclosed the porch. According to the plaintiff Mr. Meehan said that he couldn't do that because he would have to move the ESB meter to the front of the house.
20. On the morning of the accident the plaintiff left the house at about 11 a.m. to attend a funeral. It was a very bad day – it was raining and windy. As the plaintiff left the house he took the mat which was very wet and he hung it on his garden gate to let it dry off. The plaintiff visited a number of pubs and had five pints of Guinness. When going home he went to a nearby bakery and purchased some sandwiches. The plaintiff said that the five pints did not cause him any difficulties. He said that he ate one of the sandwiches and kept one for when he got home. He was returning to his house sometime after 5 p.m. It was in November and it was pretty dark but there is a street light outside the front of the house. The plaintiff said it doesn't give off a lot of light. It was very wet and windy and when the plaintiff got home he saw that the mat was gone. It did not turn up afterwards.
21. So as the plaintiff approached the porch of his house there was no mat on it.
22. As the plaintiff proceeded into his house he described what happened as follows: -

"Well as I walked onto the porch I put my right leg on...and followed with my left leg...I kind of got my key ready to go in the door. My leg went back and I stumbled and I kind of bent over a bit on the door...and then I straightened myself up. I unlocked the door then...then I kind of got ready to walk in. I pushed the handle down to open the door and my leg was just gone. I just fell forward then."

23. The plaintiff went on to describe further how his leg went: "It slipped back from underneath me and I went forward."

24. The plaintiff said that it was the wet tiles that caused this to happen and he confirmed that he had hurt his leg before he went in the door. When asked again to describe the incident the plaintiff said: -

"Just my leg just went. I can't really remember like. I just put the key up. I just fell forward. My leg, I broke my leg."

25. The plaintiff also said that two houses that he knew of had the porches enclosed with doors. These houses were around the corner from his - one would be number 15 and the other number 12, McNeil Drive. Mark Feeney used to live at number 15 and Margaret Smith used to live at number 12. The plaintiff said that they were given doors, patio doors, glass doors over ten years ago.

26. In cross-examination the version of events which the plaintiff gave to the engineer retained on his behalf was put to him. It was put to him that he had told the engineer retained on his behalf: -

"When he stepped on to the porch he slipped. He briefly struggled to retain his balance, then fell onto the porch. He broke two bones in his left ankle when he fell."

27. The plaintiff confirmed that this is the account that he gave to the engineer retained on his behalf.

28. It was put to the plaintiff that he had told the High Court Judge who heard the case previously "specifically that he fell down in the porch, not inside his house."

29. The plaintiff said in reply that he went down in the porch before he got the door open and he got himself back up. He went on to say "when I opened the door that's when I fell".

30. The plaintiff was taken slowly through the mechanism of the accident. He confirmed that he stepped on to the porch with his right foot. He confirmed that he slipped with his left foot. It was put to the plaintiff that he had told the court earlier that he had slipped and fallen to the ground. The plaintiff said that he fell to the ground after he slipped. He said that the door was closed when he slipped "...that's when I composed myself to open the door and I couldn't walk in, I fell down".

31. The plaintiff then went on to say "when I slipped, I slipped forward into the door and I banged myself off the door...I went down at an angle and I got myself back up".

32. The plaintiff went on to say that he didn't go all the way down in the porch.

33. It was put to the plaintiff: -

"Well maybe you could tell us exactly how far down you got because this is directly contradictory to the evidence you gave before the previous High Court Judge. Do you remember the evidence you gave?"

34. The plaintiff said he could not remember all of it.

35. The transcript of the earlier hearing was put to the plaintiff as follows: -

So I asked you - "Could you confirm whether you slipped before or after you put the key into the lock?"

And you said you began to slip as you entered the porch. We're still in agreement with that?

Answer: "Yes".

Question: Then you say you "Put your foot in and then opened the door and that's when I went forward."

So you're asked -

"So you're slipping. You manage to get the key into the lock?"

Answer: "Yes".

Question: "You bring the other hand while you're still slipping and you're slipping forward and you bring it around the door handle and you fall in the door".

Answer: "Yes, something similar to that".

I suggest, suggested to you that when you slip most people go backwards rather than forwards. You say:

Answer: "I slipped forward but I was still kind of upright until I got the door open and then I went down because my leg got damaged."

36. The plaintiff went on to say that when he slipped he banged into the door and his leg went back.

37. When it was put to him that there was no mention of that previously he protested that "it was wrote differently".

38. It was then put to the plaintiff again "there was no mention of you banging into the door when you were asked to give your account before the High Court previously in 2017 and you were asked on a number of occasions to explain the mechanism because it was quite

extraordinary that somebody in the course of slipping would be able to open a door with a key, so unlock the door with a key with one hand and still slipping to press a handle and open the door with the other before falling.”

39. It was put to the plaintiff “well that’s what you have confirmed repeatedly then that you did. You never mentioned striking the door, banging into the door and then falling down on the porch not once in the High Court on the previous occasions, isn’t that correct?” And the plaintiff replied “correct, yes”.
40. The plaintiff went on to say “it’s all kind of a bit of a shock. It’s just the, the way it happened. I tried to relive it.”
41. When it was put to the plaintiff that when he gave evidence previously in 2017 in the High Court he never mentioned slipping forward, hitting the door, going down, getting up, opening the door, or falling...; the plaintiff interrupted to say that he didn’t go all the way down. When he slipped he went back.
42. It was put to the plaintiff that what he was saying now was not mentioned previously – as in striking the door. The plaintiff said “I probably didn’t pronounce it or say it right”.
43. The plaintiff was reminded that it was put to him in the previous High Court hearing: -

“That it is extraordinary that a man that is slipping manages to aim his key while slipping into a lock with his left hand”.

Answer: “Yes”.
44. The plaintiff was pressed in relation to the inconsistency concerning his accounts of the accident. The plaintiff was pressed on his assertion that he had slipped forward not backwards and he was pressed on the strange part of the narrative which had him describe how he managed to get the key into the lock and open the door after slipping or in the course of slipping.
45. The plaintiff protested that he was telling the truth but said that “I am just not explaining it correct”.
46. The plaintiff was questioned as to whether or not his poor recollection - which he acknowledged - could be in any way related to the amount of drink he had consumed that day. He said it was not. He explained that he did have five pints but “if you were on a night out you’d have eight or nine maybe”.
47. While alcohol was a feature in the case the defence did state that the case was not being made that it is contributory negligence to drink or even to drink to excess. Instead, the case was being made that where alcohol was taken it becomes material to the care that one takes. When a certain amount of alcohol is taken it is material not just with regard to care but also with regard to reliability and credibility of the account given.

48. It was submitted that the defence was entitled to ask, in circumstances where the plaintiff had five pints on board, that he recollected, and had fallen in the front door of his house, whether he had adjusted his gait or taken any special care for his own safety having regard to the fact that he had five pints on board. This submission was made in circumstances where it was stated that it appeared from the plaintiff's direct evidence that he did nothing or did not take any special care in the circumstances.
49. Counsel for the defendant stated clearly that he was not making the case that the plaintiff was grossly intoxicated to the point that he could be criticised for drinking too much and that the amount that he consumed was not, said counsel, an act of negligence or contributory negligence. The defence confined itself to, as the Court of Appeal mentioned, the extent to which the consumption of alcohol was a factor in regard to the duty of the plaintiff to take reasonable care for his own safety and a factor that might explain the conflicting accounts given as to how the accident occurred.
50. It will be appreciated therefore that the defence case in relation to the alcohol which the plaintiff had consumed was quite nuanced and did fit, albeit only just, within the actual pleas in the defence.
51. When pressed in relation to his credibility given the different versions of events the plaintiff again protested "well that's similar. It's just worded differently, I did slip".
52. The plaintiff went on to say that "it's been worded so many ways now in the last eight years it's like...".
53. The plaintiff did say in evidence that he "often had a little slip" on the tiles. He explained "I wouldn't be slipping but you'd feel it when walking on it with your shoe". He maintained that "it would always be slippy. You'd always feel it on your shoes."
54. It was clear from cross-examination of the plaintiff that he had significant interaction with the defendant's staff in relation to work which had to be done on his house. It was put to him that there were records of the issues which he raised and there was no record anywhere of a complaint about tiles. The plaintiff said in reply that it was possible that they didn't log it in because they don't log everything in.
55. When asked about the moving of the door to the front of the porch the plaintiff explained:
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- "It was the tiles, I was going to level out the porch, get the door put to the front and level it out and it would have blocked all the breezes coming in."
56. He said that when he had mentioned this to Mr. Meehan the latter had told him that he would not put the door to the front because it would have meant moving the ESB box.
57. It was also put to the plaintiff that he had thirty-nine issues recorded in the computer records since 2010 and that there were more issues recorded in the previous manual

records – but not a thing on tiles. The plaintiff was asked how was it that the tiles were the only things that were not recorded and he said that he did not understand.

58. It was put to the plaintiff that the tiles were terracotta unglazed tiles which were the same that were put in hundreds of houses in the Cranmore Estate and there were no complaints made about those tiles or accidents recorded in respect of those tiles since the 1970s – to which the plaintiff replied that “they’re slippery when they’re wet”.
59. The plaintiff suffered a significant injury to his left ankle. X-rays revealed a fracture to the left distal tibia and fibula. The plaintiff was referred for orthopaedic opinion and internal fixation was subsequently carried out.
60. The second paragraph of the particulars of personal injuries in the endorsement of claim of the personal injury summons dated 22nd April of 2016 recites: -

“The Plaintiff attended with Mr. William Gain, Consultant Orthopaedic Surgeon on 18th May, 2015. Mr. Gain notes that the Plaintiff sustained a twisting type injury to his left ankle and suffered a nasty pilon type fracture. Mr. Gain notes that the Plaintiff was brought by ambulance to Sligo General Hospital where he underwent x-ray, was placed in a back slab and admitted to hospital. The Plaintiff underwent surgery the following day and had bilateral metal plates fitted to fix the fracture. The Plaintiff was reliant on crutches for some ten weeks and attended Mr. Gain’s fracture clinic on some eight or nine occasions. Subsequent to the accident, the Plaintiff developed a wound infection in the medial aspect of the left ankle which was treated with repeated dressings by his general practitioner. The Plaintiff presented with a continuing discomfort, particularly in the medial aspect of the distal tibia and ankle and the Plaintiff walked with a walking stick for many months after the said incident. The Plaintiff suffered discomfort, particularly when walking on uneven ground and/or slopes, and walking long distance aggravates the ankle pain considerably.”

What actually happened?

61. Insofar as the narrative of the event is concerned the plaintiff’s version of events certainly falls below a benchmark of crystal clarity. In fact, in terms of detail, there are a few different versions of events.
62. It may be unfair to criticise the plaintiff for not having the exact same narrative version of events in November 2021 which he had in November 2017 in relation to an accident which occurred in November of 2013. Indeed, if his narrative was exactly the same throughout he might be criticised for that. But the different versions of events do raise a more fundamental issue – which is the reliability of the plaintiff’s recollection as to what caused him to fall.
63. It is true that the vision of a man who is slipping on tiles in his porch managing to aim his key into the lock in the door – and open the door – appears extraordinary.

64. But there is a constant in each version of events offered by the plaintiff and there is a very honest logic to his protests in evidence that the versions were similar, just worded differently and that he did slip.
65. The plaintiff did struggle in evidence to articulate what actually happened but the court did not at any stage doubt his sincerity or honesty. It is likely that his recollection and recitation of events is impacted by the shock of the incident, by the alcohol he had consumed, by the speed of the occurrence, by an optimism concerning the defendant's responsibility and by the passage of time – or by a combination of one or more of those factors.
66. As a matter of probability the court is however satisfied: -
- (1) That the plaintiff did slip and fall when entering his home on 18th November, 2013 and did suffer a significant injury to his left ankle as a result.
 - (2) The fact that this Court is unable to determine the precise mechanism of the injury does not prevent the court determining the essence of what occurred – as just described. In this regard, the court is satisfied that the incident occurred very quickly and much of the difficulty surrounding the forensic dissection of what actually occurred is because such an analysis in the absence of witnesses is inevitably fraught with problems – augmented here by the matters mentioned in the preceding paragraph and because it was wet, dark, windy and the plaintiff was focussed on getting in his front door.

Were the tiles a danger?

67. The significant issue in contest in this case was whether or not the mosaic tiles in the porch were so slippery when wet as to be dangerous – and thereby caused the slip and fall. As already indicated the court will for the moment assume, for the sake of argument, that the defendant did in fact owe a duty of care to the plaintiff under s.3 of the Occupier's Liability Act, 1995. Was there a breach of that duty of care? Did a danger exist by reason of the static condition of the premises which caused the plaintiff an injury? Did the defendant fail to take such care as was reasonable in all of the circumstances to ensure that the plaintiff did not suffer injury or damage by reason of a danger caused by the mosaic tiling in the porch of No. 1 McNeill Drive, Cranmore Terrace in Sligo?
68. Mr. Tom O'Brien (Consulting Engineer) was called on behalf of the plaintiff. He examined the premises on 16th February of 2015. He explained that the porch faces south, southwest. It is open to the elements – in the face of the elements. The mosaic tiles are there since the 70s and measure 20mm x 20mm. It is not entirely clear whether Mr. O'Brien based his opinion on a simple foot test or on his visual inspection and experience of such tiles – or a combination of both. The foot test which he mentioned in evidence before the court is not mentioned in his report and was not mentioned in the earlier hearing in November of 2017. A reading of his report would suggest that his opinion was based on his visual inspection and experience of such tiles. Whatever the position in this regard, Mr. O'Brien estimated that the tiles had moderate slip resistance when wet and

were fine when dry. He expressed the view that the tiles were inappropriate for use in that application – having regard to the exposure and the fact that the tiles would be wet for much of the time. Their existence would create a risk of slipping and concrete would be much better as it gave a low risk of slip in wet and dry conditions.

69. Mr. O'Brien had also formed and expressed the view that the tiles were semi-glazed tiles. He also gave evidence that fifty-two of the sixty-one houses which he had looked at had enclosed their porches or had concrete underfoot. There were nine open porches with mosaic tiles.
70. Mr. Morgan Duggan (Consulting Engineer) was called on behalf of the defendant. He examined the tiles in May of 2017. He again described the tiles as mosaic terracotta tiles measuring 20mm x 20mm with grouted recessed joints between the tiles measuring two to three millimetres. His evidence was that the recessed joints had the effect of arresting any slip which was an advantage over a larger tile such as an eight-inch square tile. He described the tiles as standard terracotta unglazed tiles.
71. Mr. Duggan gave evidence that "terracotta tiles are very commonly used in outdoor environments, outdoor porches, patios, outdoor external areas...they are very common throughout the country".
72. Mr. Duggan's opinion – having carried out a slip assessment on the tiled porch using a slip alert tester was that the tiles offered a medium (bordering on low) risk of slip when wet, and grimy as found. And a medium risk of slip when clean and wet – again medium bordering on low he stated as the measured values were just outside the range of the slip alert graph for a low-risk. It was clear however that the measurements taken did fall into the medium risk of slip category on the graph showing Low risk of slip, medium risk of slip and high risk of slip.
73. Mr. Duggan explained that tiles used in porches had the advantage of being durable, easy to clean and aesthetically pleasing. He made the point that concrete if not maintained can build up algae or moss which would make it a high or medium to high risk of slip surface.
74. Some time was spent discussing the slip alert tester when compared to the pendulum test – and the measurements provided by both. This discussion involved reference to and discussion of the "SLIPALERT" RESULTS GRAPH reproduced in Appendix A of Mr. Duggan's report and also the "Slip Alert rollercoaster for dynamic friction" table with measurements taken which is also reproduced in that Appendix A.
75. The graph allows one to form a view based on the test results as to whether or not there is a high risk of slip, a medium risk of slip or a low risk of slip – by reference to the results shown on the slip alert survey or pendulum survey (the pendulum scores being shown on the vertical and the slip alert scores being shown on the horizontal). The graph endeavours to show at a glance the correlation between the slip alert test results and pendulum test value.

76. In the table shown in Appendix A of Mr. Duggan's report he shows the actual results he obtained when he carried out the slip alert survey in the porch at 1 McNeill Drive.
77. Another graph discussed in evidence was that referenced and reproduced in an email of Professor Morris (his evidence will be dealt with below) on 8th November, 2021. This graph which the court will refer to as the "UK probability of slip graph" appears to be a document in circulation but it was not actually proved in evidence. Significantly, the actual basis for the information contained in this unproven document is not at all clear. It is curious how the probability estimates were arrived at – and by whom. In any event, the UK probability of slip graph was not proved, and the court will disregard it for that reason.
78. On this evidence therefore, Mr. O'Brien and Mr. Duggan found tiles which had a medium risk of slip when wet. On Mr. Duggan's test carried out with the slip alert tester the slippyness of the tiles when wet was at the lower (or safer) end of the medium risk of slip category.
79. New and significant evidence was introduced by the defendant at the rehearing. The defendant called an expert witness who had not given evidence at the earlier hearing. It appears that this new expert was first contacted by the defendant in March of 2020. The new expert is Professor M.A. Morris. He is a leading Professor and Fellow of Trinity College Dublin and the lead scientist and director of the Advanced Materials and Bio-Engineering Research Centre (AMBER) based in Trinity College Dublin and Ireland's National Materials Research Centre. He has over forty years' research experience in industry and academia. Professor Morris is a world leading expert in surface science, surface chemistry and surface engineering. The written reports of Professor Morris were before the court as indeed were the written reports of Mr. Tom O'Brien and Mr. Morgan Duggan.
80. In terms of his expression of opinion, and in particular his opinion in relation to the mosaic tiles and their use at 1 McNeill Drive, the independence and expertise of Professor Morris was clearly established.
81. Professor Morris did explain to the court the inaccuracy and unreliability of field tests as opposed to the scientific tests which he carried out and the scientific results - and on which he based his opinion.
82. In answer to one question concerning the reliability of the field tests carried out Professor Morris had the following to say: -

"Yes. But, you make a point, if all of those values are absolutes and are uncontroversial measurements, and they're not. A test done on someone's front porch is not a standard test. We cannot....we only take these values when they are taken in laboratory conditions and they are measured in a very strict protocol, in the same way that we would measure roughness in the very strict protocol which is proven. Tests done in live conditions on tiles of varying cleanliness, various amounts of water, are not something that you would go and design houses or things around. They would have to be measured in laboratories. And that's where

the R value is. I mean, R values are never measured in situ, they are always measured in a laboratory. And you're well, far away from laboratory conditions. So drawing absolute conclusions from the values in Mr. Duggan's report or anyone else's report, you can't make those absolute statements that you are making."

83. The court accepts as correct what Professor Morris said in relation to the field tests carried out and any conclusions drawn from them. They cannot be and are not as reliable as the results and conclusions drawn from the scientific tests carried out in laboratory conditions.
84. Professor Morris of TCD did also say that mats can in fact increase the slip risk on tiled surfaces – although it does not appear that he carried out specific tests in this regard and he made the point that it depended on the type of mat.
85. The reference of Professor Morris to "on tiles of varying cleanliness, various amounts of water" is pertinent.
86. While the court is satisfied that the mosaic tiles in the porch were probably, if not certainly, wet on 18th November, 2013 the court is without any other reliable evidence in relation to the state of cleanliness of the tiles on the evening/night in question. The court does not know if the surface underfoot was dirty. The court is satisfied that the plaintiff did remove the mat and hang it on his gate when leaving to go to the funeral that morning. It may be that rain during the day had a washing and some cleaning effect on the mosaic tiles. If so, the result of that washing effect is unknown.
87. When Mr. O'Brien carried out his inspection there were two mats in place on the porch which were not present at the time of the accident (photo five of Mr. O'Brien's report). Photo six in Mr. O'Brien's report shows the porch with those two mats removed. It does appear that there is dirt on the mosaic tiles visible beneath where the mats were.
88. There are similar views in photographs produced by Mr. Duggan following his subsequent inspection. On this inspection there were again two mats in place.
89. In the photographs taken by Mr. Duggan and numbered image 11, 12, 13, 14 and 15 a build-up of dirt/grime is visible where the mats have been removed.
90. In the photograph described as image 13 there is what appears to be grit amongst the dirt and grime.
91. The court simply does not know what if any dirt or grime or grit or other matter was present on the surface underfoot when the plaintiff stepped on to the porch on the night of the accident. Based on the photographic evidence produced by Mr. O'Brien and Mr. Duggan it is probable that the surface underfoot outside the door on the porch was not clean on the night of the accident. In short, this Court does not know the actual state of the surface underfoot when the plaintiff stepped on to his porch on the night of the accident save that it was probably wet. It may be that matter present on the tiles made them more slippery on the night – or less slippery – and depending on where one placed one's feet.

92. Professor Morris dealt comprehensively with the tests carried out by him. His opinion was carefully and vigorously tested on cross-examination. Ultimately however, the court is satisfied that the opinion of Professor Morris is correct and in particular the court is satisfied that: -
- (a) The mosaic tiles used in the porch at 1 McNeill Drive are unglazed tiles.
 - (b) The mosaic tiles are good quality standard terracotta floor tiles.
 - (c) The tiles did not have a surface coating or a glaze that would significantly contribute to slips or falls.
 - (d) The mosaic tiles in the porch were of good slip resistance or “good to very good slip resistance”.
 - (e) The mosaic tiles used were appropriate for use in wet conditions.
93. Ms. Moran of Sligo County Council also gave evidence. She was employed by Sligo County Council as a community warden as part of the estate management team in the Cranmore Estate. It is she who gave evidence that ninety-seven houses were built in phase one and thirty-seven houses (including McNeill Drive) in phase two – in the 1970s. The records which she was working with were manual when she started in her job in 2008 and were computerised in 2010. She had checked the records. There were thirty-nine complaints from the plaintiff on the computer system commencing in July of 2010 and there were no complaints about the tiles. She found no complaints about the tiles from the plaintiff on the former system.
94. Furthermore, and significantly, she found no complaints recorded from any other residents in the second phase including the houses on this road as to these type of ceramic mosaic tiles.
95. There was a complaint recorded about black tiles in the porch of a neighbour, Mr. O’Hara. Mr. O’Hara also gave evidence. Following a complaint in an occupational therapist’s report which was submitted to Sligo County Council these black tiles were removed in January of 2016. There was a delay in removing the tiles as the report of the occupational therapist was submitted in or about August of 2014 (it is dated 18th August, 2014). However, the tiles were different. The tiles were unsuitable for the porch. It was not established in evidence who precisely was responsible for the decision to put the tiles down in Mr. O’Hara’s porch – nor indeed who actually laid the tiles. It was however clear that the tiles in Mr. O’Hara’s porch were laid when some other work was being done in his house. In any event, Mr. O’Hara’s tiles are of no great assistance to the court in deciding the issues before it. Mr. O’Hara’s tiles were replaced with concrete.
96. Mr. Meehan of Sligo County Council also gave evidence. His role was as estate manager over Cranmore Estate and two other estates. Around 2011 he surveyed the plaintiff’s windows and door as part of improvement works being carried out in the estate. He says that the plaintiff did not raise any difficulty about the tiles in the porch and that he did not

request that the porch be enclosed at that time. The windows and door work were carried out for the plaintiff around October of 2011.

97. It was put to Mr. Meehan that the plaintiff had asked him about getting the porch closed in and that Mr. Meehan had explained that there would be a difficulty in that regard because the ESB meter would have to be relocated if the porch was closed in. The point was made that the plaintiff had said that this is what Mr. Meehan had said to him when he made the request – and that Mr. Meehan when questioned on this during the first hearing did say that this is what would have to be done.
98. At this hearing Mr. Meehan explained that he is not sure now if that was the position back then [i.e. the meter having to be relocated if the porch was closed in] – although that is the current position.
99. In his evidence Mr. Meehan did not actually grasp the point that was put to him in cross-examination. The point being that the conversation must have taken place because the plaintiff recollected Mr. Meehan telling him that the ESB meter would have to be moved if the porch was filled in – and Mr. Meehan had advised the court at the first hearing that the ESB meter would have to be relocated if the porch was to be filled in. In essence it was being put to Mr. Meehan that the conversation probably took place.
100. On this, it may well be that a conversation did take place between the plaintiff and Mr. Meehan about whether or not the porch could be closed in. After all, there was a discussion about windows and the front door. The plaintiff himself in evidence referred to the improvement in drafts which closing in the porch would have resulted in. When it was put to him that he never mentioned the tiles although making other requests at the time he said “ it was the tiles, I was going to level out the porch, get the door put to the front and level it out and it would have blocked all the breezes coming in ”.
101. The court is not persuaded that the plaintiff’s issue was with the tiles if he did ask for the front porch to be closed in.
102. The court is satisfied that the plaintiff did not complain about the mosaic tiles and did not ask that they be replaced.
103. If the mosaic tiles were slippery and/or dangerous then the court is satisfied that some complaints about them would have been recorded in the Council records referred to.
104. Furthermore, the court is satisfied that these small mosaic tiles with the properties described by Professor Morris did not pose a danger on the premises. There was no want of reasonable care on the part of Sligo County Council in the design of the porch or in the installation of the mosaic tiles in the porch. Nor for that matter was there any want of reasonable care or breach of statutory duty on the part of Sligo County Council in allowing the mosaic tiles to remain in place.
105. Unfortunately, accidents do happen. The court is satisfied that the plaintiff slipped and fell and suffered a significant injury to his ankle when making his way in home by the

front door on the night in question. The plaintiff has however failed to prove that Sligo County Council is in any way responsible for that occurrence.

The Duty of Care

106. The focus at the hearing of this case was on the danger posed by the mosaic tiles – an allegation that they were dangerously slippery when wet and not suited for the exposed porch. Though mentioned there was less focus on the actual duty of care owed by the defendant to the plaintiff.
107. The plaintiff occupied the house as a tenant of the defendant, the local housing authority.
108. It is argued on behalf of the plaintiff that the plaintiff ought to be treated as a visitor to the premises and that the defendant ought to be treated as the occupier of the premises – by reason of the definitions contained in the Occupiers Liability of 1995. This argument is made in light of the provisions contained in the lease and in particular by reason of the extent of the control retained by the defendant concerning any alterations to the premises.
109. There are many difficulties with this argument. The plaintiff resided in and occupied the dwelling house and he had done so since the commencement of the lease. In addition, he had control over the state and condition of the surface under foot in the front porch in terms of keeping it clean and placing a mat or mats on it.
110. Even though the court has decided on the basis outlined above and has assumed, for the sake of the argument, that the defendant should be treated as the occupier and that the plaintiff ought to be treated as a visitor to the premises, that assumption is flawed.
111. The context in which the assumption arose is that the parties understandably focussed on the issue of whether or not the tiles were a danger and what the defendant's knowledge was in that regard. That was the heart of the dispute. Ultimately there was not a lot by way of submission from either side on the law despite the assertions made as to the legal position. Because the court has dealt with the case by deciding whether or not there was any danger and any breach of duty, if one existed, one can say that it is unnecessary to go further. However, the case has had a protracted history and it is best to consider the legal position in a more comprehensive way.
112. An occupier owes specific duties to a number of categories of entrants, under the provisions of the Occupiers' Liability Act 1995 ("the 1995 Act"). With regard to the duty an occupier owes to a visitor, s.3 of the 1995 Act provides for this duty and states as follows:
 - "3. - (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."

113. Section 1(1) of the 1995 Act provides that for a person to be classified as an occupier, the key criteria is the amount of control they hold over the property in question. Furthermore, s.1(1) of the 1995 Act envisages that there may be more than one occupier:

"... a person exercising such control over the state of the premises that it is reasonable to impose upon that person a duty towards an entrant in respect of a particular danger thereon and, *where there is more than one occupier of the same premises, the extent of the duty of each occupier towards an entrant depends on the degree of control each of them has over the state of the premises and the particular danger thereon and whether, as respects each of them, the entrant concerned is a visitor, recreational user or trespasser.*" [Emphasis added]

114. Section 1(1) of the 1995 Act appears to put the common law, as described in *Wheat v. Lacon* [1966] AC 552, on a statutory footing. In *Wheat v. Lacon*, Denning M.R. defined an occupier and control as follows:

"In order to be an "occupier" it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be "occupiers". And whenever this happens, each is under a duty to use care towards persons coming lawfully onto the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure, but each may have a claim of contribution from the other".

115. No authority was opened to the Court in which it was held that a tenant should be considered a "visitor" under the 1995 Act - nor any authority pre the enactment of the 1995 Act that considered a tenant as a visitor or invitee. There may be authority on the point or it may be that the issue has not been decided or that there is no reported decision on the point although decided.

116. Section 1(1) of the 1995 Act defines a visitor as follows:

- "(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.”

117. Applying the definition of Occupier in s.1(1) and having regard to the dicta of Denning M.R in in *Wheat v. Lacon* , it seems clear that a landlord and a tenant can both be classed as occupiers simultaneously.
118. Although the 1995 Act envisages that there may be more than one occupier, it does not provide that an occupier owes a duty of care to a fellow occupier. If both a tenant and a landlord are deemed dual occupiers of a specific premises, it appears that they owe no duty of care to the other under the provisions of the 1995 Act and therefore no cause of action exists under the 1995 Act by one against the other , save a claim for a contribution if it arises.
119. The local authority had an obligation to provide the tenant with a house which was reasonably fit for human habitation under the Housing Act 1966 but this case was not made by the plaintiff and this is referred to earlier in the judgment. Reliance on the Housing Act 1966 if pleaded would not have improved the plaintiff’s case on liability as the Court is satisfied that the evidence heard would not support an argument that there was a breach of the Housing Act 1966. It is not necessary to make this observation except to illustrate the point that the defendant did have obligations of substance to the plaintiff under the Housing Act 1966 although it did not have under the Occupiers Liability Act 1995.
120. Whether or not there is a common law duty of care separate from the terms of the Occupiers Liability Act 1995 or the Housing Act 1966 is another issue and does not arise for determination in this case. The English decisions in *Drysdale v. Hedges* [2012] All ER D 345 and *Murphy v. Brentwood District Council* [1991] 1 AC 398 are of interest in any such discussion not least because they touch on the fact that the consequence of imposing a common law duty could, especially in the case of local authorities, have far reaching effects.
121. The Court is satisfied that –
 - (a) The Letting Agreement dated 7/05/04 allows the plaintiff as tenant to reside in and occupy the house at 1 McNeill Drive. He was an occupier of the house and it’s curtilage - including the front porch - at the time of the accident. It is artificial to suggest that he was not then an Occupier and to suggest that he was a visitor to the house which he rented and occupied as his home and which he was entering. The plaintiff could not have been an Occupier and a Visitor at the same time. He was one or the other and he was clearly an Occupier.

- (b) The Letting Agreement contains standard type clauses prohibiting any works on the house without the consent of the landlord.
- (c) By reason of the clauses in the Letting Agreement it is correct to say that the defendant did retain some control of the premises and it was therefore an occupier along with the plaintiff.
- (d) The fact that the plaintiff and the defendant were together Occupiers of the premises at the time does not mean that the plaintiff has a cause of action against the defendant in respect of his accident under the Occupiers Liability Act. He does not.
- (e) The 1995 Act is an act to amend the law relating to the liability of occupiers of premises (including land) in respect of dangers existing on such premises for injury or damage to persons or property while on such premises and to provide for connected matters. It provides for the duty of care owed by the occupier towards a visitor and does not provide for a duty of care owed by one occupier to another.
- (f) It follows that the plaintiff has not established that the defendant ought to be found liable under the Occupiers Liability Act 1995 even if the alleged danger and want of reasonable care were proved. As stated above the alleged danger and want of reasonable care were not proved.

122. This Court is satisfied that the evidence does not prove liability. As the plaintiff's claim is not proved it is therefore dismissed and the Court will hear any application arising at 10.30 a.m. on Friday 14th January, 2022 in Court 7.