THE HIGH COURT

[2020] IEHC 547

[2018 No. 02111]

CORK CIRCUIT **COUNTY OF CORK**

BETWEEN

LEAH MULCAHY (A MINOR SUING BY HER MOTHER AND NEXT FRIEND KRYSTLE MULCAHY)

PLAINTIFF

AND

CORK CITY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Richard Humphreys delivered on Wednesday the 21st day of October, 2020

1. The defendant owns and occupies land in suburban Cork City adjacent to the estate in which the plaintiff lives. The land includes a green area in which there are some boulders which seem to have been there for a period of around 25 years. Children are known to play on the boulders and the adjoining wall and a lamp post every day, according to the plaintiff's mother.

2. The plaintiff was born in May 2009 and suffered an injury on 22nd July, 2017 when she broke her arm after jumping off a larger boulder onto an adjoining smaller boulder.

3. The personal injury summons does not refer to the Occupiers' Liability Act 1995 as such, but is rather framed in terms of negligence. However, the 1995 Act displaces the general law of negligence in relation to the tort liability of occupiers for the static condition of premises (s. 2(1)). Very reasonably, Mr Lynch for the defendant didn't take any pleading point.

4. The particulars of breach of duty in the personal injury summons can be summarised hopefully without too much injustice to them by saying that the boulders constituted a trap or allurement and that the defendant failed to fence them off, failed to remove them and ignored complaints (that latter aspect faded away somewhat on the evidence).

5. I have been greatly assisted by Mr. Seamus Roche S.C. (with Mr. David Kent B.L.) for the plaintiff and from Mr. John F. Lynch S.C. (with Mr. James Duggan B.L.) for the defendant. There was not a huge conflict on the material facts. While the mother's version of the accident was hearsay and differed somewhat from the direct evidence of the plaintiff, and while a somewhat different version is given in the contemporaneous medical documentation, I would accept the plaintiff's account at the hearing as being a correct explanation of how the injury was sustained.

Evidence of Krystle Mulcahy

6. The plaintiff's mother said that she always told the plaintiff to come off the rocks, but the children tended to stay out playing on those rocks. On the occasion in question, the plaintiff was with friends and her cousin. Ms. Mulcahy's father was just across the road and picked up the plaintiff after the incident. The mother was originally told by the plaintiff that she had fallen off the wall adjoining the two boulders. The reason why that

account had been given, as the mother understood matters, was because the plaintiff had been told not to play on the boulders so did not initially want to admit to having done so. She confirmed that the area in question was open to all residents.

7. The plaintiff was taken to hospital and had a displaced fracture above the elbow. Her bones were manipulated and wired together. The wires were removed around four weeks later. She was referred for physiotherapy, but did not tolerate it very well.

8. Under cross-examination it was put to her that the pleadings suggested the incident happened at 3 pm, but the timing of incident in the hospital notes was 9.15 pm. She said it was at night and didn't know why the pleadings were incorrect, but said she brought the child to hospital straight away. It was put to her that all the records made at the time said that the plaintiff fell off a wall, and her answer was that her understanding was that the plaintiff had jumped from the wall to the smaller of two boulders. She agreed that the boulders had been there for 25 years. While she seemed to accept that their purpose was to prevent dumping or unauthorised visitors camping there, she didn't think that they were stopping people and pointed out that cars could still get around into the green area from the other side. It was put to her that there was no record of any complaint and she seemed to accept that by saying there didn't need to be any complaint.

Evidence of Leah Mulcahy

9. The plaintiff was eight at the time of the incident and is now eleven. I received her evidence under s. 28(1) of the Children Act 1997. She came across as a very bright and intelligent child who gave very factual, intelligible and calm evidence. I would be very confident for her future and I accept her evidence as to how the accident happened.

10. She was playing on the rocks at the time, this being something that regularly happened. Her mother had said the area was dangerous. She was jumping from the larger rock onto the smaller one, got to the middle of the small rock, lost her balance, fell to the left side (to the downhill side), and landed on her arm. She told her mother that she fell off the wall because the mother had told her to stay off the rocks. She had an operation, was in a cast for four weeks, found that painful, had physiotherapy which was also painful and had shooting pains in her arm every once in a while. Under cross-examination. she confirmed that the injury came from jumping from rock to rock not from wall to rock as her mother had understood and she knew she should not have been there.

Evidence of Kieran Spitere, Engineer

11. Mr Spitere inspected the *locus* on 11th September, 2018. He understood that the City Council had put boulders to prevent access to green areas around 30 to 40 years ago at a number of locations, although he thought they were not many left around the city. He said that one could still drive a vehicle in on the right hand side of the green area, so that the rocks were not performing any function for the past twenty years. He thought that they were an enticement to children in the middle of an estate with a high population of children and that children were going to play on them and it was like making a "*playground obstacle course*". He thought they were dangerous and not suitable and should be replaced by bollards.

12. Under cross-examination he did not agree that these kinds of boulders were relatively common, was not aware of other examples, and thought there were some around, but not in the middle of a housing estate. Other local authorities might use them, but he was not aware of other places where children had access. He thought it was a simple task to take the boulders away and not that onerous. They were unnecessary and not serving any function. He accepted the Council had a legitimate aim, but thought other boulders were not lined up like the ones here. I would accept his evidence that the boulders are no longer serving any purpose for the simple reason that one can drive around on the other side. That was also the mother's evidence. I would also accept that they are an enticement for children in the sense that they are something for children to climb on, and that children can and do climb them on a regular basis. His opinion that the boulders were dangerous only goes so far, however, in the sense that the fact of the accident proves that there was a danger, but the legal duty even in negligence is not to remove *all* dangers, only those dangers the removal of which it is reasonable for the law to require.

Evidence of Emer O'Callaghan, Parks Department, Cork City Council

13. Ms. O'Callaghan said the boulders were placed in the late 1990s under a community employment scheme, where areas were cleaned up, and part of that process was putting in boulders to stop unauthorised access of vehicles. It was not Council policy to build walls everywhere. Under cross-examination she said that the estate was constructed in the 1960s or 70s and that the boulders were supplemented by bollards put in in the early 2000s when car parking and front vehicular access was provided for the houses. She said there had been an awful amount of illegal dumping and unlawful access to lands around that time. It was put to her that if someone wanted to get into the green area they could. She viewed the boulders as a deterrent. She said the Council has not been asked to remove them and that children play on all public open spaces. When it was put to her that children were known to play in the area and that the boulders were attractive to children, she said children will play on anything. When it was suggested that they were irregular objects, dangerous and the children were likely to fall off, she said children would fall off anything and that the Council had never been asked to remove them. I broadly accept her evidence insofar as it goes.

The status of the plaintiff under the 1995 Act

14. While there was disagreement about whether the plaintiff should be categorised as a visitor or recreational user, I will assume for argument's sake that the plaintiff should be regarded as a visitor on the basis that the land was provided by the local authority as part of the amenities of the housing estate, the logic being that to that extent there was an implied permission to residents to use the lands, thereby rendering the residents visitors rather than recreational users.

15. That imposes the higher common duty of care akin to the negligence standard. By contrast, the duty towards recreational users is not to injure them intentionally or to act with reckless disregard. Section 4(2) of the 1995 Act sets out the factors to which regard is to be had for that purpose, but as the Supreme Court emphasised in *Weir-Rodgers v. The S.F. Trust Ltd.* [2005] IESC 2 (Unreported, Supreme Court, 21st January, 2005*), per* Geoghegan J. (Murray C.J. and Denham J. concurring), at paras. 12 and 13, the court

should not fall into the trap of considering the s. 4(2) the factors without taking into account that they "*have to be pitched at a level more indulgent to the defendant*". McMahon and Binchy in *Law of Torts*, 4th ed. (Dublin, Bloomsbury, 2013), validly point out that all of the s. 4(2) factors are also relevant to negligence (p. 471), which makes all the more important the Supreme Court's emphasis that that mustn't distract from the fundamental question that reckless disregard involves a degree of carelessness worse than negligence. I should perhaps add that while McMahon & Binchy question whether what they call aimless "mooching" by children really amounts to recreational use (p. 461), I don't think there is a distinction. Children's recreational use *is* recreational use, and aimless mooching is recreation *par excellence*. The learned authors also suggest that the concept of recreational use should be construed narrowly (p. 461), but there is no valid basis in the statutory text, context or intention for such an approach. However, as noted above, I am going to assume here that the duty of the Council here was not simply not to intentionally injure or act with reckless disregard, but to give effect to the common duty of care.

Does the common duty of care require the removal of features on land such as those here?

16. Analysing the case in terms of the common duty of care, the duty of an occupier is not to remove *all* dangers. I accept the defence evidence that children would climb on anything, and a case of this nature shows the possible hidden social cost of over-expansion of tort law. The logic of the plaintiff's position is that we must go from a situation where children are jumping on rocks on a regular basis, all day every day according to the plaintiff's mother, and presumably having fun doing it (otherwise why do it), to one where things that they can jump on have to be removed and we end up with a bland and featureless landscape. Large boulders do not represent a hidden danger or an unusual danger and (absent special features) there is nothing in particular about them against which an occupier should provide protection on the negligence standard, leaving aside altogether the reckless disregard standard.

17. As regards the evidence that removing the two boulders is not particularly onerous, which I would accept, the real question is not so much whether it is feasible to remove these two specific boulders, but the burden of broadening that and extrapolating the logic across the whole City or indeed logically, the whole country, for all occupiers to remove anything that children would be capable of jumping on and falling from. That would impose an unreasonable burden such that even applying the common duty of care, let alone reckless disregard, it would go beyond a duty that the law should properly impose on occupiers.

18. It can be said that the boulders amount to an allurement, in the weak sense that they became the focus of children's play. It can also be said that there was a danger, in the weak sense, to be inferred from the fact the accident happened at all. I accept that the council knew that children were using the land. I would also accept that the boulders did not really serve any useful purpose in this specific green area because one could easily drive around them.

19. But danger plus allurement plus knowledge plus lack of legitimate purpose do not in themselves add up to negligence in the absence of a final legal policy factor, which is that the danger is one that it is reasonable for the law to require a defendant to obviate. The boulders may be allurement to children, they may form what Mr Roche eloquently calls an "*assault course*", but they are not alluring in the sense of enticing one into any hidden danger or any unusual danger. Children will jump on things, and the boulders have not been shown to represent any danger significantly greater than or fundamentally different from other structures likely to be jumped on, whether human or naturally occurring.

20. So my conclusion under the liability heading is, assuming that this action is to be viewed on the common duty of care basis, as opposed to the reckless disregard basis, I don't think that the particular danger of injury from jumping from boulders of this nature is one that the law should properly impose a liability on an occupier to obviate. To clarify, that is essentially for two legal policy reasons, firstly the social cost of removing all such features from the landscape, including the loss of opportunities for unstructured children's play, as here, and secondly the undue burden on occupiers if one extrapolates the logic to require the removal of all structures and features which could be theoretically the subject of similar accidents.

Order

21. Accordingly, I must dismiss the claim, but purely because I do not consider that the action succeeds under the 1995 Act and not because of any lack of acceptance of the factual evidence on the plaintiff's side.

Postscript – form of the order

22. Following announcement of the foregoing result, I was told that the form of the order would therefore be to affirm the Order of His Honour Judge James O'Donohoe of 10th July, 2020. It is a commendable practice in Circuit Appeals, not just in the personal injury context, if information about the outcome appealed against is withheld from the court until after the appeal has been decided. There is a reason that science prefers the double-blind trial – it eliminates unconscious bias. Here admittedly the system is single-blind because everyone else in the courtroom knows what happened in the Circuit Court, but they are careful not to mention it, just as they wouldn't allude to a without prejudice communication or a tender offer. The book of pleadings here stopped at the original trial – there is no order or notice of appeal, no headings of plaintiff/appellant, defendant/respondent, just plain old plaintiff and defendant. The book of pleadings didn't even state on whose behalf it was prepared. But a single-blind system is much better than not being blind at all.

23. Some (probably most) people reviewing another's decision have a natural tendency to assume it was correct. Others for whatever reason tend to the reverse position. (Lord Birkett thought that this was the stance of some appellate judges. After his first sitting in the Court of Appeal he commented: "*I feel no human judgment can stand up against three critical and hostile minds. [Lord] Wilfred Greene starts with a bias against the judgment being right*" (quoted in H. Montgomery Hyde, *Norman Birkett: The Life of Lord Birkett of Ulverston* (London, 1964) p. 483)). Others still may find their attitude affected

by what they know or think they know of the form of the particular original decision-maker. Not knowing the result simply cuts out all those problems, and the feeling of deciding a Circuit Appeal without knowing the outcome below is qualitatively different and is much more like making a first instance decision. That is far more in keeping with the spirit of the appeal by way of re-hearing.