THE COURT OF APPEAL

UNAPPROVED

Record Number: 2024/118
High Court Record Number: 2019/3724P
Neutral Citation Number [2025] IECA 13

Noonan J.

Faherty J.

Binchy J.

BETWEEN/

KRISTINA KANDAUROVA

PLAINTIFF/RESPONDENT

-AND-

CIRCLE K ENERGY GROUP LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 27th day of January, 2025

1. Life is full of dangers which may cause injury if not avoided. Small children develop by encountering and learning to avoid things that can be fallen off, bumped into, tripped over or knocked down. In the common law of occupiers' liability, ordinary everyday dangers are

described as *"usual"* and as such, do not attract liability. A good example of a usual danger is a flight of stairs as instanced in *Lavin v Dublin Airport Authority plc* [2016] IECA 268. One can fall down a staircase and suffer injury if one does not take reasonable care for one's own safety. The common law duty of an occupier to a visitor was to use reasonable care to prevent damage from unusual danger which he knows or ought to know – *Indermaur v Dames* (1866) LR 1 CP 274 at 287 *per* Willes J. Such a danger is one which the visitor would neither expect nor anticipate and thus may not be able to guard against by taking normal care.

2. This is reflected in the language of the Occupiers' Liability Act, 1995, section 3 of which provided at the relevant time:

> *"3(1) An occupier of a 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."*

3. While section 3 does not refer to unusual dangers, the occupier's duty to take reasonable care to ensure that the visitor does not suffer injury from a danger on the premises is conditioned by the care the visitor may reasonably be expected to take for their own safety. Such care by a visitor is to be expected in the context of usual dangers on the premises

precisely because such dangers are to be expected. In the absence of such care by the visitor, the occupier will not be liable.

4. Conversely, the taking of normal care by a visitor may not guard against unusual dangers because they are unexpected. Consequently, the distinction between usual and unusual dangers remains relevant and often central to liability under s. 3 as the authorities considered below show.

5. The plaintiff in this appeal tripped over a concrete kerb on the forecourt of the defendant's fuel station suffering injury. The High Court found in her favour and awarded damages. The defendant appeals against the judgment of the High Court on both liability and quantum.

Background facts

6. The defendant is a well-known operator of fuel stations with convenience stores located throughout the country. One such fuel station is located on Strand Road, Sandymount, in Dublin. The plaintiff, who was born on 11th September, 1981, lives near the fuel station and on the morning of 26th August, 2016, was driving to work just after 7am. She was 5 months pregnant at the time. It was a bright sunny morning and the sun had just risen. As she was early for work, she decided to drive into the filling station to get a takeaway coffee. She parked in front of the convenience store in a designated space on the garage forecourt with the intention of getting the coffee and walking across the road to sit on a park bench beside the strand to watch the sun rise over Dublin Bay.

7. There are three marked parking bays perpendicular to the store on either side of the entrance. The plaintiff parked in the middle space on the right side facing the store. The space to her right was empty. The three spaces were demarked or *"bookended"* at the right

extremity by a raised pavement, described as a *"nib pavement"* bounded by standard concrete kerbstones. This nib pavement was joined by a footpath beside the store and immediately in front of where the plaintiff parked her car. This footpath area was, to an extent at least, taken up by merchandise such as fuel supplies, flowers and the like.

8. The plaintiff got out of her car, walked around the back of it into the store and got a coffee. When she exited the store, she again walked round the back of her car intending to go across the road to the strand. The plaintiff's accident was captured on CCTV and as she came to the nib pavement, she tripped over the kerb and fell forward onto the ground. As is evident from the video footage and the still photographs, the sun was very low in the sky and the plaintiff was facing into it, wearing sunglasses, as she walked. She clearly did not see the raised kerb immediately before she fell. The accident was obviously a shocking one for the plaintiff, particularly having regard to her condition.

Evidence in the High Court

9. The plaintiff in her evidence accepted that the fuel station was within walking distance of her home and that she *"must have"* been there on previous occasions. She said that it was on her way to work and she *"must have"* stopped there to put fuel in her car previously. She also agreed that she *"must have"* seen the nib pavement as she parked her car. She said that she did not take the route along the footpath in front of the store because it was blocked.

10. Forensic engineers were called on both sides with each having provided the usual report in advance. In his report, the plaintiff's engineer stated that he was of the opinion that she was presented with a trap situation; she had to walk across the forecourt and the nib pavement because the path in front of the store was blocked. He suggested that typically such kerbs are painted yellow or dished. He expressed the opinion that the defendant was in breach of its duty under s. 3 of the 1995 Act. In his direct evidence, the plaintiff's engineer

described the nib pavement as an unnecessary and introduced hazard. His evidence was that the kerb should have been dished or its presence indicated by signs or bollards and/or yellow paint.

11. In his evidence, the defendant's engineer described the nib pavement in the following terms:

> *"I mean this type of pavement finger is a common part of the vernacular of car park design, surface car parks, and you see it in lots of public surface car parks. The typical features like this, commercial buildings, and sometimes on the public street also, and what it does is it just demarcates one end of this particular parking bay and that is patently what it is designed to do."*

12. He described the kerb as a feature that is *"widely found, is common and ubiquitous"*. He agreed that on occasion, kerbs could be marked by paint and so forth but described this as rare and said most kerbs are not marked. He again described the arrangement in the fuel station as a *"normal and very familiar arrangement on concrete footpaths and tarmacadam streets"* and *"something that we are all familiar with because it is typical, it looks like a tarmacadam street and a concrete footpath."* He disagreed that it was an appropriate area for dishing as otherwise, there would be no kerbs anywhere if each one required dishing.

13. The following exchange occurred with the defendant's engineer at the conclusion of his cross-examination:

> *"Q. Okay. I just want to conclude, Mr. Walsh by saying, that the presence of this nib pavement was a trap that was waiting to cause an injury to somebody such as the plaintiff, do you agree with that?*

A. No, I don't, Judge. As you know my evidence is that it is a very common feature in car parks, it is where in a typical location as to where you would normally find it and that is my evidence, Judge."

14. A significant plank of the plaintiff's case was the fact that the pavement immediately in front of the store was blocked and had this not been the case, the plaintiff could have taken this route and avoided the nib pavement entirely. There was also a complaint that there was no warning of a tripping hazard. The defendant's case however was that the nib pavement, insofar as it did constitute a hazard, was a *"usual"* danger in respect of which the plaintiff was required to take reasonable care for her own safety.

Judgment of the High Court

15. In an *ex-tempore* judgment delivered immediately at the conclusion of the hearing, the judge found that as the plaintiff exited the store, the footpath to her left was blocked by the items referred to and also two bollards. The judge found that this meant that she had no option but to go round the back of her car and across the nib pavement. The judge went on to hold as follows:

"It seems to me that in relation to the defendant's duty of care that the continuous storage of bulky items for sale along the footpath, such as to render it impassible for most pedestrians but, in particular, I would have thought, for this pedestrian who was five months pregnant, was an act of negligence on the part of the defendant and, as a result of which, the plaintiff was forced out onto the forecourt."

16. On the same theme, the judge went on to hold that *"the placing of those large storage items there and, effectively, blocking off the pedestrian footpath which would have provided*

a safe exit route to the plaintiff in my view, amounts to negligence and breach of duty of care on behalf of the defendants towards the plaintiff."

This appears to constitute the primary finding of negligence by the judge against the defendant.

17. The judge then turned to the issue of contributory negligence and in doing so, referred to the photographs taken by the plaintiff's engineer, saying:

> *"In my view, I think it gives a clear view of how at an approach the nib pavement is almost indistinguishable from the surrounding surface ground in the car park, and in the absence of some highlighter, whether it be stripes or yellow paint or marker or plastic wands or whatever, it could easily have been identified as a hazard by such minor precautions being taken.*
>
> *I am not satisfied that there was any contributory negligence on the part of the plaintiff in this case, so I find the defendants liable, 100% liable for the injuries caused to the plaintiff."*

The appeal

18. I think it fair to say that the essential complaint of the defendant in relation to the judgment of the High Court on liability is that there was no evidence before the High Court to suggest that the nib pavement was an unusual danger of a kind that attracted liability under the 1995 Act and in reaching her conclusions, the judge failed to have regard to the fact that it was undisputed that the nib pavement was a commonplace feature to be found not only in garage forecourts but in street and car park architecture generally, both public and private.

Was there a breach of the common duty of care?

19. As is clear from the passages in the judgment to which I have referred, the judge's primary finding against the defendant appears to be based on the fact that the footpath was blocked and but for that fact, the plaintiff would not have suffered her accident. However, it appears to me that the logic of that position does not withstand any real scrutiny. In particular, the judge's primary finding of negligence fails to consider in any way whether the presence of the nib pavement constituted an unusual danger, which amounted to a breach of the defendant's duty to take such care as was reasonable to ensure that the plaintiff was not injured by a danger on the premises.

20. I am satisfied that there is no true causal link between the obstruction of the footpath and the plaintiff's accident. There are any number of reasons why the plaintiff might have decided to take the route she did. For example, if she had decided to park her car and simply walk across to the strand, she would have encountered the same alleged danger. The plaintiff could have fallen elsewhere on the garage forecourt, a fall which might have been avoided if she had taken the footpath, but it does not follow that the blockage of the footpath thus becomes the proximate cause of the accident. There was nothing to suggest that the defendant had a duty to the plaintiff to provide a footpath at all, and accordingly, whether it was blocked or not was irrelevant in my view.

21. As noted by this Court in *Ahmed v Castlegrange Management Company Limited and Anor* [2022] IECA 269 (at para. 34):

> *"The fact that a particular precaution might have prevented an injury provides no basis for finding that it ought to have been taken. The view of an expert that something should, or should not, have been done is not, without more, of much assistance to the court. If that view is supported by evidence that the precaution is*

required by law, is the subject of some relevant standard, is widely regarded as best practice by reputable scientific or industrial bodies, or is something that is commonly done because it is seen as necessary or desirable on the part of employers, occupiers or whatever class the particular defendant belongs to, then that may provide a sound evidential basis for the opinion expressed, upon which the court may rely. However mere assertions of opinion by experts unsupported by such evidence really do not advance matters."

22. The primary difficulty with the finding of negligence in this case however is that it was arrived at without any reference whatever to whether or not the nib pavement constituted a danger in respect of which the defendant failed to take reasonable care to ensure the plaintiff was not injured. In considering the common law duty of care that preceded the 1995 Act, Peart J., speaking for this Court in *Lavin*, referred to the judgment in *Long v Saorstát Eireann* [1959] 93 ILTR 137 in which Murnaghan J. said in relation to the duties of an occupier:

"The plaintiff had to establish that the defendants had failed to take reasonable care to prevent damage from unusual danger which they knew or ought to have known."

23. Peart J. found that s. 3 of the 1995 Act reflects the common law principles which it put on a statutory footing (at para. 48). The court went on to highlight the continuing relevance of the distinction between usual and unusual danger in the following terms (at para. 46):

"The distinction between an unusual danger and a usual danger is important even in the context of s. 3 of the 1995 Act. A fixed staircase can be the cause of injury to the person descending same, since it is not difficult to lose one's step for any number of reasons, and fall. Such a danger is however a usual danger that any adult would anticipate and take care to avoid by, perhaps, holding the handrail provided, or

ensuring that he/she is not carrying anything likely to cause loss of balance. It is the sort of danger that exists by reason of the nature of the staircase itself without any defect existing. On the other hand, the fixed staircase might have a defect that the invitee/visitor could not anticipate or be aware of. For example, the handrail might not be securely fastened to the wall, and may give way when used for balance, causing the person to fall. That would be an unusual danger, and therefore one in respect of which the occupier has a duty to guard or warn against, failing which he will be liable for any injury that ensues."

24. Also relevant to the facts of the present case is Peart J.'s observation (at para. 54):

"One can always say that but for some particular thing an accident would not have happened. But the thing in question must be the proximate or real cause of the accident."

The complaint there was inadequacy of signage on an escalator on which the plaintiff fell indicating the presence of lifts and a stairs. There was in the court's view a *"disconnect"* between the inadequacy of signage and the proximate reason for the plaintiff's fall on the escalator on the facts of that case. The same disconnect arises here between the blockage of the path and the plaintiff's fall over the kerb of the nib pavement.

25. *Lavin* was more recently cited with approval in this Court in *White v William Doherty and S & K Carey Limited* [2019] IECA 295 where Donnelly J., delivering the Court's judgment, referred to the distinction between usual and unusual dangers and, in reference to *Lavin*, said (at para. 29):

"In the case of a usual danger, examples of which were a fixed staircase and an escalator, absent some unusual defect or danger being present and in respect of

which the visitor ought to be warned and protected, the occupier will not be liable if the visitor loses her step and falls. As Peart J. stated: '[i]n other words provided that reasonable care has been taken by the occupier no liability will exist.'"

26. The plaintiff in that case had tripped over a loose stone on the grass surface of a caravan park. In relation to whether a breach of s. 3 had occurred, Donnelly J. went on to hold (at para. 34):

"In the absence of a finding by the trial judge that these loose or embedded stones had constituted an unusual danger by virtue of their size or the fact that they had recently been imported into the area it cannot be said as a matter of law that there has been breach of the common duty of care."

27. In another recent trip and fall case, also coincidentally in a caravan park, *Scanlan v McDonnell T/A The Woodlands Caravan and Camping Park* [2024] IEHC 324, the plaintiff tripped over an electrical cable between her caravan and a power source provided by the occupier of the caravan park, the cable having been put in position by the plaintiff's husband.

28. Coffey J. considered the relevant authorities including *Lavin* and *White* noting that in *Lavin*, Peart J. stated that the common law distinction between an unusual danger and a usual danger remains *"important"* in assessing whether a risk which exists on a premises will as a matter of law constitute a *"danger"* for the purposes of the Act of 1995. Coffey J. said (at para. 20):

"In using the word 'important', Peart J. appears to suggest that the distinction between a usual and unusual danger, whilst significant, is not of itself determinative. Where a danger is 'usual', it merely connotes the fact that on any objective assessment, the danger complained of arises from the nature of the premises such

that is to be anticipated by the person using the premises. … It appears to follow from [Lavin] that where a court finds that a risk of injury arises from a 'usual danger' which can be avoided by the taking of reasonable care on the part of the visitor to the premises, there will be no breach of the common duty of care and no liability will arise under the provisions of s.3 of the Act of 1995."

29. In dismissing the claim, the court went on to find as follows (at para. 24):

"It would appear from the foregoing that no liability can arise under s.3 of the Act of 1995 where a court finds as a matter of law that: -

(1) the risk of injury complained of by the plaintiff merely constitutes a 'usual danger' in the sense that it is a risk of injury that necessarily arises from the nature of the premises, and which is on any objective assessment to be anticipated by the visitor and;

(2) the risk of injury thereby created can be avoided by the visitor taking the care which they may reasonably be expected to take for their own safety."

The judge went on to hold that on any objective assessment, the danger complained of was a feature that one would expect to find at any caravan park and it did not as a matter of law constitute an *"unusual danger"*.

Decision and Conclusion

30. There was no evidence in this case that the nib pavement constituted an unusual danger. In fact, the opposite was the position. The defendant's engineer gave the clearest evidence, to which I have referred above, that a kerb of this kind is ubiquitous, evidence which went entirely uncontradicted. This Court has on many occasions in the past referred

to the fact that a court should use its own common sense and experience when it comes to everyday matters which are the subject of expert evidence.

31. This is such a case. The feature over which the plaintiff fell is to be found everywhere, and certainly commonly in fuel stations. Indeed, it seems to me that kerbing of this nature is such a commonplace feature of everyday life as not to require expert evidence to establish its omnipresence. Anybody crossing the street encounters precisely the same danger or hazard. It seems to me that it cannot by any stretch of the imagination be described as *"unusual"* as a matter of law. The fact that the plaintiff's engineer offered the view that the kerb should have been painted or dished or have some form of signage or notice on it might well have made it more visible to the plaintiff as he suggested. That however is not the test and, as noted above in *Ahmed*, the fact that any of these measures might have avoided the accident does not mean that the defendant is liable for failing to take them.

32. As I noted at the outset, unusual dangers attract liability for the very reason that they are unusual and consequently unanticipated. It cannot be said in the present case that the plaintiff did not anticipate, or could not have expected, the danger presented by the nib pavement not just because it was a usual danger, but also because she knew about it. As she agreed herself, she *"must have"* seen it before the accident occurred. It was there to be seen on her previous visits to this filling station. It was there to be seen when she drove up on the day of the accident and parked. It was there to be seen when she got out of her car beside the nib pavement and finally, when she walked towards it. It is of course idle to speculate on the reason for the plaintiff falling in such circumstances, but one thing is clear and that is that the plaintiff cannot have been taking reasonable care for her own safety in failing to see the kerb over which she fell.

33. There are many cases which treat of a trial judge's obligation to engage with the evidence at least to the minimum extent sufficient to enable the parties and an appellate court to understand the outcome. In the present case, the court was required to engage with the uncontroverted evidence of the defendant's engineer concerning the ubiquity of such kerbing, assuming such evidence to have even been necessary in the first place. That, unfortunately, did not occur in this case. Such engagement was a prerequisite to a determination of whether the kerbing or nib pavement constituted an unusual danger in respect of which the defendant breached its duty of care to the plaintiff.

34. In my judgment, had the court properly considered this undisputed evidence, it could not have concluded other than that the danger presented here was a usual danger and as a consequence, there was no breach of the common duty of care by the defendant.

35. In the circumstances therefore, I am satisfied that the judge was in error in concluding that there had been a breach of s. 3 of the 1995 Act or indeed any negligence on the part of the defendant that led to the plaintiff's injury in this case. I would therefore allow this appeal and substitute for the order of the High Court an order dismissing the plaintiff's claim.

36. My provisional view in relation to costs is that as the defendant has been entirely successful, it should be entitled to its costs both in this Court and in the High Court. If the plaintiff wishes to contend for an alternative costs order, she will have liberty to deliver written submissions within 14 days of the date of this judgment not to exceed 1,000 words and the defendant should respond within 14 days likewise.

37. As this judgment is delivered electronically, Faherty and Binchy JJ. have authorised me to record their agreement with it.