



THE HIGH COURT

[2024] IEHC 486

Record No. 2019/5822 P

BETWEEN

CHRISTOPHER O'DRISCOLL

PLAINTIFF

AND

IRISH PROVINCE OF THE BONS SECOURS SIS

DEFENDANT

Judgment of Ms. Justice Emily Egan delivered on 31st July, 2024

Introduction

1. The plaintiff, born on 26th August 1981, sustained serious injuries when attempting to climb over a high palisade gate (“the gate”) on the northern boundary of the grounds of the Bon Secours Hospital, Tralee (“the hospital”).
2. The hospital, over 100 years old, is located in Tralee town centre on a 10.5 acre site, bounded on the south by Strand Road, on the east by Matt Talbot Road and on the north by Balloonagh Estate. The plaintiff’s residence is close to the main entrance/exits of the hospital on the Strand Road. At the time of these events, the plaintiff’s children were pupils at the Holy Family School (“the school”), which is located just off the Balloonagh Estate, close to the exit on the northern boundary of the hospital. The plaintiff maintains that for several years he had been accustomed to taking a short cut from his residence through the hospital grounds when collecting his children from the school. He asserts that there was never any restriction to his using the hospital’s main entrance on the southern boundary, traversing the hospital grounds,

passing through the gate, crossing the hospital's carpark and exiting on to the Balloonagh Estate and to the school nearby. The hospital's northern boundary on the Balloonagh Estate was protected by palisade fencing, incorporating the gate. The plaintiff states that, although the gate was occasionally closed, it was usually left open and that he and other people in the vicinity would regularly use this route as a shortcut.

3. On 21st September, 2016, the plaintiff was to collect his eldest child from school at "out time", namely 2.40 pm. He had intended to cycle to the school from his home, taking the short cut through the hospital grounds exiting via the gate onto the Balloonagh Estate. However, the plaintiff found the gate closed and locked. The plaintiff's evidence was that he heard the school-bell ringing, became concerned that if he turned back, cycled through the hospital grounds and around the eastern perimeter along the Matt Talbot Road to the school, he would be late in collecting his child. Instead, the plaintiff decided to climb over the locked gate. First, he threw his bicycle over the palisade fence into a public access car park, owned by the hospital and located on the other side. Then he climbed up the gate, using the vertical shooting bolts and the horizontal lock casing on the gate as footholds. In circumstances outlined below, the plaintiff jumped from the top of the gate and landed heavily in the car park.

The plaintiff's injuries

4. The plaintiff sustained a serious injury from the fall, namely an open intra articular comminuted fracture of the distal tibia and fibula in his right leg. This necessitated multiple theatre attendances for washout of the open fracture and subsequent internal fixation. The plaintiff was an inpatient for seven days. Healing was delayed and an exigent ultrasound had to be applied to improve healing. Recent x-rays confirm healing of the tibial fracture. However, the plaintiff remains in pain and functionally limited; he has scars consistent with an open tibial fracture and subsequent internal fixation; he has reduced range of movement in the right ankle

and ankle swelling unlikely to improve, together with limited plantar flexion; he is unable to walk on tiptoe and experiences difficulty on the stairs because of ankle stiffness; the plaintiff can walk only one kilometre approximately without discomfort. The plaintiff is unable to lift heavy objects and can only perform light manual duties. As such the plaintiff experiences limitations in his ability to perform certain daily activities in that he cannot climb a ladder, carry a wheelbarrow, return to his martial arts hobby or play soccer with his children.

The gate

5. The following is common case: both the perimeter fence and the gate are constructed as palisade fencing. Palisade fencing is constructed of steel pales which are attached to horizontal rails connected to vertical joists. The gate is 2050 millimetres high, or approximately six feet, nine inches. The top section of each side of the gate has a horizontal bar (or “crossbar”) located approximately 250 millimetres below the top of the gate. Each side of the gate is secured with a shooting bolt at the bottom. The top sections of the shooting bolts protrude at right angles approximately to the gate. The ground beneath the vertical shooting bolts was not fitted with inserts, or receivers, in which the shooting bolts could be held in a rigid position. Rather, there are two recesses in the tarmacadam into which the left hand and right hand shooting bolts respectively descend. Close to these recesses, is an area of ravelled or gouged tarmacadam which appears to have been caused by different placements of the shooting bolts and/or by opening and closing the gate. When the gate is locked and the shooting bolts are in their respective recesses, there is a small amount of play, or movement, in the shooting bolts on the road surface. The two sides of the gate, when locked, are not fully aligned to each other: instead, they are proud of the fencing and in a slightly strained position.

6. The plaintiff acknowledges that he was guilty of significant contributory negligence in climbing the gate in the first place, but maintains that the gate is damaged, defective and

unstable which caused him to fall. The plaintiff asserts that the gate represented a “*danger existing on the premises*” and alleges that the defendant is liable to him under the Occupiers Liability Act 1995 (“the 1995 Act”).

The plaintiff’s case as pleaded and his evidence to the court.

7. The plaintiff’s evidence was that he had never before observed the gate to be locked, nor climbed it and was not aware of other people doing so.

8. The plaintiff’s case, as pleaded, is that as he was in the course of climbing over the top of the gate, it moved to and fro suddenly and without warning catapulted him from the top of the gate into the carpark on the other side.

9. The plaintiff’s evidence to the court was that as he started to climb the gate it was initially quite solid. He was about three quarters of the way up, quite close to the crossbar, before he felt it move. His intention had been to stand on the crossbar, step over the top of the gate, turn around and then slide down the other side (as there were no potential footholds on the far side of the gate). As the plaintiff reached the crossbar at the top of the gate, it tilted quickly and violently because it could not hold his weight. He was worried that he was going to be thrown off the gate and might land on his head. The plaintiff therefore jumped from the top of the gate, landing on his feet but in the process sustained a crush injury to his right leg. Contrary to his pleaded case, the plaintiff’s evidence was not that he was catapulted from the top of the gate but instead that, in fear of falling, he jumped.

10. Under cross examination, the plaintiff accepted that he had had reasonably long distance vision and from some distance away could observe that the gate was closed. He conceded that at that stage he could have turned around, cycled back through the hospital grounds and around the perimeter of the hospital, particularly as he had a further ten minutes to get to the school by that route. The plaintiff agreed that it was entirely his own decision to climb the gate; and that there was nothing near the gate to encourage him to climb it, in the

sense that there were no ladders, left-over materials or blocks on which he could stand in order to climb the gate. When asked in cross-examination if he accepted that he had taken an unnecessary risk in attempting to climb over the gate the plaintiff replied “yes”. The plaintiff acknowledged that the manoeuvre which he intended to carry out at the top of the gate was dangerous in the extreme and that he had taken a completely unnecessary risk in attempting it.

Evidence of Mr. Gerard Ryan, the facility manager of the hospital

11. Mr. Gerard Ryan, the facility manager of the hospital since 2011 gave evidence that the gate had been installed in 2006 or 2007 some eight or ten years prior to the plaintiff’s accident in 2016. Although Mr. Ryan conceded that the gate was occasionally opened for maintenance work and for the delivery of large pieces of equipment, the default position was that it was closed and locked. In general, if someone wanted to open the gate they would have to get a key from Mr. Ryan himself or another designated member of staff. Indeed, Mr. Ryan explained that the public car park, owned by the hospital, was on the other side of the locked gate. Vehicular access and egress to and from this car park to the Balloonagh Estate is controlled via barriers. If therefore the gate was left open, the hospital would likely receive little payment from members of the public parking in the car park because they would simply drive from the car park through the gate, through the hospital grounds and exit by the front entrance of the hospital (in the reverse direction to the plaintiff), without paying. Mr. Ryan’s evidence was that people did not, in general, take a short cut through the hospital precisely because the gate was generally closed. He had never seen anyone attempt to climb the gate prior to this and was entirely unaware that anybody would ever try and do so.

The CCTV

12. CCTV footage of the incident shows the plaintiff arriving at the locked gate on his bicycle, which after some moments he throws over the gate. Then, using the handles of the shooting bolts and the lock casing, he starts to climb the gate between 2.30 and 2.31 pm. The CCTV footage shows the plaintiff reaching the height of the crossbar upon which he places one foot. He places his other foot on the top of the palisade fencing, in which the gate is incorporated, steadying himself with his hands. At this point the plaintiff jumps forward in order to propel himself clear of the top of the palisade fencing. In so doing the plaintiff clears the top of the gate and lands very awkwardly on the ground, rolling back into the base of the gate on the other side.

13. It is entirely clear from the CCTV footage that the plaintiff was not “catapulted” from the top of the gate. Indeed, the plaintiff himself did not so allege in evidence. Instead, the plaintiff’s evidence was that he jumped rather than risk falling from the gate because the gate had wobbled which made him feel unsafe and unbalanced.

The plaintiff’s engineering evidence

14. Evidence was given on behalf of the plaintiff by Mr. Ger O’Keeffe, consulting engineer. Mr. O’Keeffe’s opinion was that the two sides of the gate were unstable because the vertical shooting bolts were not inserted into metal receivers in the ground as would be common practice to ensure that they would not move. In his view, the absence of appropriate receivers for the shooting bolts together with the strained position of the gates meant that the gate posed a danger to those who attempted to climb it, particularly as the gate would be expected to be rigid and not to move. Mr. O’Keeffe’s evidence was that initially the gate remained stable when the plaintiff started to climb it, but when he reached the top of it and leant over to assess how best to descend the other side, the transfer of his weight caused the gate to wobble. As a result,

the plaintiff lost his balance and fell. Mr. O’Keeffe’s evidence was that the CCTV footage showed some movement in the gate at this point.

15. Under cross examination, Mr. O’Keeffe accepted that an entirely plausible explanation for what is shown on the CCTV footage is that, when the plaintiff felt the gate beginning to move, he jumped, rather than fell. This, of course, was also the gist of the plaintiff’s evidence.

16. Mr. O’Keeffe fully accepted that the manoeuvre which the plaintiff would have had to perform at the top of the gate in order to turn 180 degrees and descend the other side was hazardous in the extreme. I agree. The plaintiff was two metres off the ground standing on the crossbar with his left foot between the vertical joists and his right foot on or over the top of the palisade fence. To face the fence, the plaintiff would have had to turn 180 degrees by removing his left foot from between the vertical joists and pivoting on his right foot to clear the top of the fence. Mr. O’Keeffe fully accepted that this manoeuvre would have placed the plaintiff at very significant risk of slipping, falling or potentially hitting his head on the fencing.

The defendant’s engineering evidence

17. The evidence given on behalf of the defendant by Mr. Paul Twomey, of Paul Twomey and Associates, consulting engineers was that, once the plaintiff reached the gate and found it to be closed and locked, he would have had ample time to exit the hospital by the front entrance and walk around the perimeter to the school, which would have taken approximately seven minutes, even on foot. Given that the plaintiff was on a bicycle, this would have taken no more than two minutes. Either mode of travel would have allowed more than adequate time to reach the school before “out time”.

18. Mr. Twomey’s evidence was that the palisade fence was a perimeter fence, but also served a security purpose. Neither the palisade fence nor the gate were designed to be either

stood on or climbed. It was extremely risky for the plaintiff to even attempt to climb the gate irrespective of whether there was any movement in the gate.

19. Mr. Twomey's view is that the plaintiff did not jump because the fence wobbled. The slight movement in the gate when the plaintiff was at the top was, he said, caused by the momentum of his attempt to jump clear of the fencing. Any movement in the gate evident on the CCTV footage is a response to the plaintiff's jump and not the cause of it.

20. Mr. Twomey did not accept that the lack of receivers for the shooting bolts meant that the gate was in any way defective. He considered that there was no instability in the gate itself. He accepted that, as the gate was not restrained at the top, there would always be some movement in response to a person's weight if positioned at the top of the gate. On the other hand, Mr. Twomey did accept that if appropriate receivers for the shooting bolts had been placed in the ground, then the gate may have been somewhat steadier.

Did the gate move?

21. It is common case that the CCTV footage shows some slight movement in the gate as the plaintiff draws the gate towards himself to start climbing up; and that, there appears to be some movement in the gate when the plaintiff reaches the top of the gate and jumps forward over to the other side. Also, it is common case that when the plaintiff lands on the other side of the gate and rolls back towards it his body weight again moves the gate.

22. There is however a dispute as to whether the CCTV footage shows movement in the gate at the point at which the plaintiff is balancing on the crossbar at the top of the gate. I was unable to discern any appreciable movement in the gate at that point. Rather, it appears that the gate is reasonably stationary while the plaintiff assesses the situation and it does not move until the plaintiff apparently jumps from the top of the gate. Although I appreciate that the CCTV footage is not continuous, it records fourteen frames a second. If therefore there were any

substantial movements when the plaintiff was on the top of the gate one would expect it to be picked up by the CCTV.

23. Although it is not possible to entirely exclude the possibility of some movement in the gate when the plaintiff had reached the height of the crossbar, any such movement must have been reasonably minor. It is quite understandable that even a small movement would make a person feel unstable and unsafe if, like the plaintiff, they are almost six feet above ground and partly suspended over the top of the palisade fence. However, it is hard to understand why, on detecting some movement in the gate, the plaintiff elected to launch himself over it rather than to climb back down in the manner of his ascent.

Legal principles

24. The key point, to which I now turn, is whether in all the circumstances, the failure of the defendant to secure the bottom of the gates with shooting bolts is in breach of any duty which it owed to the plaintiff.

25. Under the 1995 Act, persons who come onto another's premises are divided into three categories:

- Visitors
- Trespassers
- Recreational users

26. A visitor is an entrant who is lawfully on the premises of an occupier either at the invitation or with the permission of the occupier. An occupier of a premises owes a duty ("the common duty of care") 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) to ensure that a visitor to the premises does not suffer any injury or damage by reason of any danger existing thereon. A danger is defined in s. 1 of the 1995 Act, in relation to any premises,

as meaning a danger due to the state of the premises. The plaintiff was not a patient of the hospital, nor was he visiting a patient in the hospital and he had no work or function to perform in the hospital. It is therefore common case that the plaintiff was not a visitor to the premises.

27. The parties did not address the court on whether the plaintiff should be classified as a recreational user or a trespasser. In my view, the plaintiff was not a recreational user. Section 1 of the 1995 Act defines a recreational user as an entrant who, with or without the occupier's permission or invitation, is present on the premises without charge for the purposes of engaging in a recreational activity. Section 1 of the 1995 Act defines recreational activity as an activity conducted in the open air, including sporting activities, scientific research and nature study and so forth. That definition would not encompass the plaintiff's activity of taking a shortcut through a hospital grounds. In my view the plaintiff was a trespasser. However, little turns on this because it is clear that, at the time of the plaintiff's accident, s. 4 of the 1995 Act imposed upon occupiers the same duty to both recreational users and trespassers.

28. Section 4 provides:

"4. Duty owed to recreational users or trespassers.

(1) In respect of a danger existing on premises, an occupier owes towards a recreational user of the premises or a trespasser thereon ('the person') a duty—
(a) not to injure the person or damage the property of the person intentionally, and
(b) not to act with reckless disregard for the person or the property of the person, except in so far as the occupier extends the duty in accordance with section 5.

(2) In determining whether or not an occupier has so acted with reckless disregard, regard shall be had to all the circumstances of the case, including—
(a) whether the occupier knew or had reasonable grounds for believing that a danger existed on the premises;
(b) whether the occupier knew or had reasonable grounds for believing that the person and, in the case of damage, the property of the person, was or was likely to be on the premises;
(c) whether the occupier knew or had reasonable grounds for believing that the person or property of the person was in, or was likely to be in, the vicinity of the place where the danger existed;
(d) whether the danger was one against which, in all the circumstances, the occupier might reasonably be expected to provide protection for the person and property of the person;
(e) the burden on the occupier of eliminating the danger or of protecting the person and property of the person from the danger, taking into account the difficulty, expense

or impracticality, having regard to the danger of the premises and the degree of the danger, of so doing;

(f) the character of the premises including, in relation to premises of such a character as to be likely to be used for recreational activity, the desirability of maintaining the tradition of open access to premises of such a character for such an activity;

(g) the conduct of the person, and the care which he or she may reasonably be expected to take for his or her own safety, while on the premises, having regard to the extent of his or her knowledge thereof;

(h) the nature of any warning given by the occupier or another person of the danger; and

(i) whether or not the person was on the premises in the company of another person and, if so, the extent of the supervision and control the latter person might reasonably be expected to exercise over the other's activities.”

29. There is no suggestion that the defendant intentionally injured the person or property of the plaintiff. The question is whether or not the defendant acted with reckless disregard for the plaintiff or the property of the plaintiff.

30. As pointed out by Hanna J. in *Michael Kelly v. Transdev Dublin Light Rail Ltd and Transport Infrastructure Ireland* [2018] IEHC 693, the threshold of reckless disregard is high.

31. In determining whether or not an occupier has acted with reckless disregard for a recreational user or trespasser the court must have regard to all of the circumstances of the case including the nine factors specified in s. 4(2). As observed in *McMahon and Binchy* “Law of Torts” (Bloomsbury Professional, 2013), the court is not required to regard any of these factors as decisive. Rather, each such factor is part of the tapestry of facts about which the court must form a view as to whether or not there is reckless disregard.

32. As is clear from ss. 4 (2)(a) to (c) of the 1995 Act, much will turn on whether or not the occupier knew, or had reasonable grounds for believing, that there was a danger on the premises or that the plaintiff was likely to be on the premises or in the vicinity of the danger. In the present case, the plaintiff’s evidence is that the route which he intended to take was a well-worn shortcut. On balance, I do not believe that this is plausible. I accept the evidence of Mr. Ryan that the gate was generally kept shut. That being so, it is difficult to understand why the plaintiff entered the hospital on the occasion in question. The best that can be said is that if the

gates were occasionally left open, perhaps he hoped that they would have been open on this occasion.

33. Furthermore, even if the defendant ought to have reasonably known that persons would attempt to take a shortcut through the hospital grounds, there is no evidence that the defendant could reasonably have believed that such persons, on finding the gate locked, would attempt to climb it. The gate was not intended or designed to be climbed. It was designed as, and is an integral part of, a security fence. Although the plaintiff states that the grounds of the hospital were frequently used as a shortcut, his evidence was that he had never before attempted to climb the gate and that no other person known to him had ever before attempted to do so. In such circumstances, I find that the defendant could not reasonably have known that the plaintiff would attempt to climb the gate.

34. Subsections 4 (2)(d) and (e) of the 1995 Act require the court to consider whether the danger was one against which the occupier might reasonably have been expected to provide protection and to consider the burden on the occupier in eliminating the danger - taking into account the difficulty, expense or impracticability in so doing. If I were to find that the defendant had reasonable grounds for believing that persons would climb the gate, notwithstanding that the gate was not designed to be climbed, then conceivably the defendant ought to have taken steps to ensure that the gate was as stable as possible. That would have involved installing the usual receivers for the shooting bolts (particularly given the comparative ease and lack of expenditure in doing so).

35. However, as the defendant had no reasonable grounds for believing that the plaintiff or any other person would climb the gate, then in my view ss. 4 (2)(d) and (e) of the 1995 Act do not come into play. As there is no credible evidence upon which this court could conclude that the defendant knew, or ought to have known, that the plaintiff would attempt to climb the gate, its obligation did not extend beyond taking reasonable care to ensure that the gate did not pose

any threat or danger to people using it in a normal way, namely opening and closing the gate or passing through it on foot or in a vehicle.

36. Moreover, even if the absence of receivers for the shooting bolts resulted in the gate being inadequately secured, the plaintiff's case would still fail on causation grounds as that was not the cause of the plaintiff's injury. It is clear from the CCTV footage that, even if there was some movement in the gate while the plaintiff was standing on the crossbar, this movement did not cause him to fall. On viewing the CCTV footage, the plaintiff does not appear to fall from the gate at all, but instead appears to jump, rather than to climb back down. This is evident from the plaintiff's jump which looks reasonably controlled and deliberate. His arms are not flailing. He jumps up and outwards in order to clear the gate (although he landed awkwardly and injured himself).

37. Therefore, even if the gate ought to have been secured by appropriate receivers for the shooting bolts, the defendant's failure to do that did not cause the plaintiff's injury which was caused entirely by the plaintiff's decision to take an unacceptable risk and by his failure to take any reasonable care for his own safety.

38. Section 4 (2)(g) of the 1995 Act, which is of particular relevance, requires the court to have regard to the conduct of the person and the care which he or she might reasonably be expected to take for their own safety having regard to the extent of their knowledge. The court is satisfied that it was entirely clear to the plaintiff, when he saw the locked gate, that the route which he proposed to take to the school was inaccessible. Although the plaintiff still has the benefit of the duty of care owed to him by the defendants pursuant to s. 4 of the 1995 Act, he ought to have identified the obvious risk in attempting the climb over the gate. That ought to have prompted him to turn around and circumnavigate the complex, which he had adequate time to do. The manoeuvre which the plaintiff intended to perform at the top of the gate was extremely hazardous, irrespective of any movement in the gate. Even if the plaintiff was

justified in attempting to climb the gate, on discerning any movement in the gate, he ought to have turned around and climbed back down the way he had come up.

39. The court is satisfied that any reasonable person in the position of the plaintiff would have declined to take the risk which he took or, if taken, such person must accept responsibility for the consequences of that decision.

40. The defendant was entitled to assume that trespassers to the premises would take all reasonable care for their own safety; that adults can normally look after their own welfare; and that an adult exercising reasonable care would avoid attempting the manoeuvre which the plaintiff attempted to perform.

41. Therefore, I am satisfied that the defendant did not act in breach of the 1995 Act. The defendant did not intentionally injure the plaintiff. Having regard to the legitimate assumption that adults are expected to act with due regard for their own safety (see judgment of Irvine J. at paras. 45 and 46 of *Byrne v. Ardenheath* [2017] IECA 293), I am not persuaded that the defendant could be said to have acted with reckless disregard for the safety of the plaintiff.

42. It is regrettable that the plaintiff sustained significant injury but responsibility for that injury cannot lawfully be laid at the door of the defendant and the plaintiff's case must be dismissed.

Appearances

Gerry Kiely SC, Henry Downing SC and Elizabeth Murphy BL for the plaintiff instructed by Cashell Solicitors

Murray Johnson SC and Sandra Barnwell BL for the defendant instructed by RDJ LLP