

Neutral Citation No. [2010] NIQB 110

Ref: **TREH4992.T**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **26/05/10**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION**

BETWEEN:

MARY BAXTER

Plaintiff;

and

**WILDROSE PROPERTIES LIMITED and
DEPARTMENT FOR REGIONAL DEVELOPMENT**

Defendants;

and

NSL SERVICE GROUP

Third Party.

TREACY J

[1] In this action the plaintiff claims damages for personal injuries sustained as a result of an incident which happened on 18 April 2007 when she was sitting on a bollard within the car park area of the Tower Centre in Ballymena. She claimed that she was struck on the back of the head by an object that she alleged was thrown from the top floor of an adjacent car park. After the incident had occurred she claimed that she looked round and up towards the area of the top of the car park where she said she saw two heads on the top of the car park bobbing up and down.

[2] There were a number of features of her evidence which I found less than satisfactory. She did not report the incident on the day of the accident and Mr McCollum QC, who appeared on her behalf with Michael Lavery Jnr, had

opened the case on the basis that the reason it had not been reported was because there was no-one to report it to. However, that was not the plaintiff's evidence. She simply did not make any attempt to report it according to her evidence. She also said that she did not see anything being thrown. She did not know what struck her but, as I have already indicated, she said she had been struck on the back of the head.

[3] It seems to me this is significantly at variance with the account recorded by Mr Ewart in his diary entry. She had reported the matter to Arthur Ewart, who was an employee of the defendant in this case, a third party who was made defendant and who took over the action from the DRD and they were responsible for the maintenance, control and management of the car park from which the missile was allegedly thrown which struck her on the back of the head and that was, of course, the basis upon which they had been brought into the case. But in the record of the complaint made by the plaintiff which was taken by Arthur Ewart, an employee of the defendant, which was made on 19 April 2007, the day after the incident and, therefore, the most contemporaneous account that is available to the court, the record is as follows:

“Two ladies at office window complaining about youths throwing items from top of multi-storey. She alleged that as a result of trying to avoid these missiles she went back and twisted her ankle. I explained that although we did check the building routinely we were not security officers. I advised her to contact Road Service (Ballymena). She accepted that when youths see our staff they see high vis [*which is an abbreviation for high visibility jackets*] they run thus making it impossible to apprehend the culprits.” [*own emphasis*]

From that account it is apparent that she makes no mention whatsoever of being struck on her head or, indeed, of being struck at all although she did say in her evidence that she had reported this to Mr Ewart whom she knew. But also she claims in this account that there was more than one missile being thrown and that she was trying to avoid these missiles when she went back and twisted her ankle. Little of this almost contemporaneous account as it seems to me is consistent with her description of the incident to this court.

[4] In cross-examination she referred to pens, batteries and small stones lying about outside the shop adjacent to where she said she had been struck whilst sitting on the bollard. She did not, however, in her evidence-in-chief give this evidence nor perhaps more significantly was it opened so it does not appear, therefore, from its absence from the opening and from her evidence-in-chief to have been a feature of her case until she was being cross-examined.

[5] When she was asked by the medical consultants in this case she denied any previous problem with her left ankle which was the area of injury which was the subject of the claim that I was dealing with. In court her evidence was that she could not remember any previous problems with her left ankle. This seems a little surprising in view of the entry in her medical records for 16 May 2003 which record in her clinical notes "Pain in left ankle with intermittent swelling of both feet especially at night" and then there is a reference to "X-ray ankle".

[6] The court was also furnished with the Accident & Emergency Notes. The Accident & Emergency Notes that the court has the relevant entry appears to be dated on 23 April 2007 which was just slightly less short of a week after the incident giving rise to the injury. It appears that she went to the Accident & Emergency on 23 April following surgery attendance. It is not entirely clear when that surgery attendance was, but there is no note of any head injury consistent with her being struck with a missile and, indeed, in her evidence she had in fact complained that the missile had left her with a bump on her head but there is no contemporaneous evidence to support that account.

[7] In short I am not satisfied in the light of these considerations to the requisite standard that the plaintiff was injured in the manner she described. Moreover the incident happened in public during daylight hours in a busy shopping mall. Despite this no evidence corroborating her account was called and significantly, as I say, the first detailed record of her account is materially inconsistent, in my view, with her account on Oath before the court.

[8] Even if I had been persuaded that the plaintiff had been injured in the manner she described I would have concluded on the evidence that the defendant was not liable for the deliberate act of a third party in assaulting the plaintiff. In this respect the court was referred to paragraph 12-31 of Clerk & Lindsell on Torts which indicates that the courts are somewhat disinclined to hold defendants liable for failure to guard against the deliberate activities of third parties and demand a high degree of foreseeability and a close relationship between the parties. The text also suggests that a similar tendency is likely to apply in occupiers liability cases, for example where a claimant alleges that the ill-nature of a car park or a vestibule acts as an attraction for potential robbers and they refer to a number of cases that support that proposition, but the general point that is being made is that it is essentially only in exceptional circumstances that a defendant will be liable for the deliberate act of a third party. In any event, even if it had been established, which it was not, that what occurred was foreseeable and that the parties were legally proximate, the plaintiff failed to establish that the defendant, who had in my view a system of reasonable inspection, had not taken all reasonable steps to prevent a third party assaulting the plaintiff and, accordingly, the claim is dismissed.