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Judgment: approved by the Court for handing down | *Delivered:* **04/12/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

ANTHONY BROWN

Plaintiff:

and

THE DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant:

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STEPHENS J

Introduction

[1] The plaintiff, Anthony Brown, 38, sustained a fracture of his right ankle when he fell on steps on a footpath at Dunavon Park, Dungannon, County Tyrone, at 9.00 p.m. on 20 August 2011. He brings this action against the defendant, the Department for Regional Development, as the responsible road authority. The amount of damages has been agreed at £17,500. The issues for my determination are:-

(i) whether the defendant is liable to the plaintiff and if so then

(ii) whether the plaintiff was guilty of contributory negligence.

[2] Mr Keenan QC and Mr Hunt appeared on behalf of the plaintiff and Mr Cush appeared on behalf of the defendant.

Factual background

[3] The plaintiff, whose home is approximately 1 mile from where the accident occurred, had visited a friend in Dunavon Park when at 9.00 p.m. and upon leaving his friend's house he was walking towards a main road along a footpath leading to steps down to a lower level. The footpath was constructed with cement flagstones as was the steps. The plaintiff gave evidence that as he walked towards the steps he was caused to stumble and fall to his left hand side onto a sloping grass area. He subsequently discovered that the reason for him losing his balance was that there was a missing flagstone at the top of the steps and his left foot had gone down the additional and unexpected distance into the hole left by the missing flagstone and onto an uneven surface.

[4] The footpath and the steps are in a housing estate which was constructed by the Northern Ireland Housing Executive. The roads, footpath and the steps have been adopted by the defendant. It was estimated that there were about 100 dwellings in this estate and the evidence was that the steps were close to a playground area for children. Dunavon Park is a cul-de-sac in the estate.

[5] The flagstones forming the surface of the footpath are of differing sizes. They are laid on a bed of sand and the join between the flags is grouted. The juxtaposition of the flagstones is sufficient to prevent lateral movement and accordingly the flagstones do not need to be laid on a bed of cement in order to prevent them from moving laterally.

[6] The position is different when steps are constructed with flagstones. The last flagstones on the footpath at the very top of the steps have to be all of a smaller dimension that is 2ft x 2ft. Those flagstones have to be secured by way of cement bedding. This is because the leading edge of the flagstones at the top of the steps is not secured in position by an adjacent flagstone. If it was laid on a bed of sand then there would be nothing apart from its own weight to prevent it from moving forwards down the steps. Accordingly the last row of flags at the top of the steps is secured on a bed of cement. The same principle applies to all the flagstones that make up the steps. Each has to be secured on a bed of cement. The rise of each step consists of a row of bricks. The area under the flagstones and between the bricks is filled in with cement and it is onto this cement that the flagstone is laid with the intention that a bond is formed between the flagstone and the cement sufficient to prevent the flagstone from moving.

Credibility of the plaintiff's account

[7] A number of matters were raised by the defendant in relation to the credibility of the plaintiff's evidence. Those matters included that the plaintiff, despite sustaining a fracture, did not attend hospital until the next day. That at the hospital and at follow-up, it was recorded in the medical notes and records that he

had twisted over on his ankle. There was no mention of a missing flagstone or of the accident happening on steps. That the plaintiff, despite having sustained a serious injury and knowing that an injury could be caused to other pedestrians, did not report the matter to the defendant until September 2011 and then only in the context of making a claim for compensation. Finally, it was suggested that the nature of the defect, that is a missing 2ft x 2ft flagstone was of such a size with such a resulting degree of obviousness, that it was hard to accept that the plaintiff could not have seen and avoided the defect given that it was daylight at the time. Accordingly, that the improbability of him failing to see the defect called into question whether the accident occurred in the way that he suggested in his evidence.

[8] In assessing credibility I have sought to apply the guidance of Gillen J in Thornton v NIHE [2010] NIQB 4 in which he stated at paragraphs [12]-[13]:

> "[12] Credibility of a witness embraces not only the concept of his truthfulness i.e. whether the evidence of the witness is to be believed but also the objective reliability of the witness i.e. his ability to observe or remember facts and events about which the witness is giving evidence.
>
> [13] In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following;
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> (a) The inherent probability or improbability of representations of fact.
>
> (b) The presence of independent evidence tending to corroborate or undermine any given statement of fact.
>
> (c) The presence of contemporaneous records.
>
> (d) The demeanour of witnesses e.g. does he equivocate in cross examination.
>
> (e) The frailty of the population at large in accurately recollecting and describing events in the distant past.
>
> (f) Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication.

(g) Does the witness have a motive for misleading the court.

(h) Weigh up one witness against another."

[9] An assessment of the credibility of the plaintiff's evidence has also to take into account an assessment of the credibility of Michael McGrath, a witness called on behalf of the plaintiff. He gave evidence that the flagstone had been broken and that a few pieces of the broken flagstone had been lying around at these steps for "a few months at least". He stated that he thought that it was an accident waiting to occur and yet it never occurred to him to report it despite the risk to his own family and their children.

[10] The points that were made on behalf of the defendant in relation to credibility were all valid matters and in some instances would lead to a conclusion either that the court could not be satisfied on the balance of probability that the plaintiff's account was correct or to the view that the plaintiff's account was positively incorrect. Accidents and defects can be contrived. However, there was no evidence that the plaintiff had any previous claims. There was no adverse evidence as to the plaintiff's character. My assessment from his demeanour in court was that he was an honest individual. The medical notes and records are not meant to be an account for the purposes of litigation but are a short summary made by a doctor or nurse for the purposes of treatment. I accept that the plaintiff did not consider reporting the matter despite the risk of injury to others. I have more difficulty in accepting that explanation from Mr McGrath. However, in essence I accept the plaintiff's evidence as to how the accident occurred and accordingly I find as a fact that the plaintiff was caused to stumble and to lose his balance by virtue of a missing flagstone at the top of these steps and that as a consequence he sustained a fracture of his right ankle.

Legal Principles

[11] The plaintiff's claim is for breach of statutory duty under Article 8 of the Roads (Northern Ireland) Order 1993. Article 8(1) imposes on the defendant a duty to maintain the footpath and the steps. Article 8(2) provides the defendant with a defence if it proves that it "had taken such care as in all the circumstances was reasonably required to secure that the part of the road to which the action relates was not dangerous for traffic …". For the purposes of that defence the court shall in particular have regard to the following matters:

"(a) the character of the road, and the traffic which was reasonably expected to use it;

(b) the standard of maintenance appropriate for a road of that character and used by such traffic;

(c) the state of repair in which a reasonable person would have expected to find the road;

(d) whether the Department knew, or could reasonably have been expected to know, that the condition of the part of the road to which the action relates was likely to cause danger to users of the road; and

(e) where the Department could not reasonably have been expected to repair that part of the road before the cause of action arose, what warning notices of its condition had been displayed."

[12] Girvan J in Keenan v Department of the Environment for Northern Ireland [1995] NI 343 at 347 (g)- 348 (j) stated:

"3. When a plaintiff sues the department alleging a breach by the department of its duty to maintain a road two separate questions arise for determination once the plaintiff proves that he or she was injured as a result of an alleged defect: (a) Was the road in a dangerous state as a result of a failure to repair and maintain? (b) If so, did the department take such care as in all the circumstances was reasonably required to secure that the relevant part of the road was not dangerous for traffic, having regard in particular, but not exclusively, to the matters set out in art 8(3). (See such cases as the Court of Appeal decision in Frazer v Dept of the Environment for Northern Ireland [1993] 8 NIJB 22 and the authorities therein discussed.) If the plaintiff fails to establish (the onus being on the plaintiff) that the road was in a dangerous state as a result of the failure to repair, the second question does not arise."

4. The determination of the question, whether the road was dangerous is a question of fact and degree, the test of dangerousness being objective (see *Rider v Rider* [1973] QB 505). Judicial minds may legitimately differ on whether an alleged defect makes a road dangerous provided that the proper test is applied (see White v Dept of the Environment) [1988] 5 NIJB 1 and Rider v Rider). The fact that a plaintiff falls and sustains a serious injury does not per se condemn the road as dangerous (per MacDermott LJ in Doggett v Dept of the Environment for Northern Ireland (25 March 1988, unreported)). The fact

that a road is 'potentially hazardous' likewise does not in itself lead to the conclusion that the road is dangerous for purposes of applying the test (see Frazer v Dept of the Environment for Northern Ireland). The test of dangerousness has been variously expressed by the courts. Thus, for example, in Meggs v Liverpool Corp [1968] 1 All ER 1137 Lord Denning MR stated that a highway is in a dangerous condition if it is not reasonably safe for people using it. In Mills v Barnsley Metropolitan *BC* (7 February 1992, unreported) Dillon LJ formulated the question to be whether the defect presented a real source of danger. In James v Preseli Pembrokeshire DC [1993] 1 PQR 114 the court pointed out that the danger must be the sort of danger which an authority may reasonably be expected to guard against. This latter formulation, in my respectful view, is of limited assistance since it is circular. For my part the most comprehensible and workable formulation of the test is that stated by Denning LJ in Morton v Wheeler (1956) Times, 1 February cited in Dymond v Pearce [1972] 1 QB 496 and approved by the Court of Appeal in Rider v Rider where he stated:

> "If a reasonable man, taking such contingencies into account, and giving close attention to the state of affairs, would say: "I think there is quite a chance that someone going along the road may be injured if this stays as it is," then it is a danger; but if the possibility of injury is so remote that he would dismiss it out of hand, saying: "Of course, it is possible but not in the least probable," then it is not a danger."

Those are the principles which I seek to apply.

Was the footpath and steps in a dangerous state as a result of a failure to repair and maintain?

[13] On 20 August 2011 there was a missing flagstone at the top of these steps. Mr Cush conceded correctly and I find that if the flagstone was missing that the footpath and steps were in a dangerous state as a result of a failure to repair and maintain.

Did the defendant take such care as in all the circumstances was reasonably required to secure that the relevant part of the road was not dangerous for traffic?

[14] The defendant relied on sufficiently frequent inspection of the footpath by its personnel and its policy whereby defects consisting of depressions of 20 millimetres or greater would be identified and subsequently remedied. The defendant also relied on its policy that gaps between flagstones of 20 millimetres or greater would also be identified and subsequently remedied.

[15] An issue arose at the hearing in relation to the frequency of the inspections carried out by personnel on behalf of the defendant. The defendant's personnel inspect this footpath and the steps every 16 weeks. It was suggested on behalf of the plaintiff that the defendant's policy at the time in 2011 required inspections to be carried out every 8 weeks and accordingly that there was a breach of the defendant's own policy and that this suggested that the defendant did not take such care as in all the circumstances was reasonably required to secure that the relevant part of the road was not dangerous for traffic. Furthermore that, quite irrespective of the defendant's own policy inspections at 8 weekly intervals were appropriate given the unique character of the footpath and the traffic which was reasonably expected to use it.

[16] The last inspection prior to the accident was on 6 July 2011. Accordingly, even if the inspection ought to have been carried out at 8 week intervals, as suggested by the plaintiff, then the next inspection would not have occurred until after the plaintiff's injuries were sustained on 20 August 2011. That finding disposes of the plaintiff's allegation that the inspections were carried out at inappropriate intervals.

[17] In addition no evidence was given by or on behalf of the plaintiff as to the defendant's policy in 2011. Accordingly I find that there was no breach of the defendant's policy in relation to the intervals between inspections which evidence could have led to a finding that the defendant did not take such care as in all the circumstances was reasonably required to secure that the relevant part of the road was not dangerous for traffic. Finally I accept the defendant's evidence that the footpaths were inspected at 16 week intervals and had been inspected at those intervals over the last 15 years. No evidence was given that this had proved to be inadequate in practice.

[18] The plaintiff suggested that even if the frequency of the inspections was adequate that the nature of the inspections that were carried out were inadequate and accordingly that the defendant did not take such care as in all the circumstances was reasonably required to secure that the relevant part of the road was not dangerous for traffic. The allegation was that the inspections concentrated on the size of a gap or the depth of a depression. That the inspections paid little, if any regard, to whether the bond between the cement under the flagstone and the

flagstone itself had been broken so that a flagstone forming part of the steps was loose and inevitably would break.

[19] The plaintiff relied on the evidence of Mr McGlinchey, Consulting Engineer, who inspected the footpath and steps on 16 November 2011. He also inspected other steps which were close to the steps on which the accident occurred ("the other steps"). His evidence was that one method of a flagstone forming part of steps deteriorating leading to a situation in which it was no longer present was that it lost its bond with the cement holding it in place so that it moved. He considered that once the flagstone was capable of movement then over a period of time it was inevitable that it would move. That the movement would result in an overhang of the flagstone over the next step down and that the flagstone given its limited tensile strength would break. That this process would inevitably lead to the steps becoming a danger to those using them. Accordingly, that it was appropriate for any inspection of the steps also to check for flagstones that no longer were secured in place by a bond to the concrete bedding. That if such a flagstone was found it could easily be lifted and the old cement raked out or chipped away. The flagstone would then be re-laid on a new bed of cement and the danger avoided.

[20] Mr McGlinchey stated that no inspection was undertaken by the defendant to establish whether flagstones forming part of steps had become loose from the cement bedding. He called in aid his inspection of the other steps. He found a flagstone which was loose and had moved some 5 millimetres. The defendant's witness, Mr Hance, accepted that the particular flagstone shown in the photograph of the other steps had moved and was no longer secured to the underlying bed of cement. He also accepted that no report of such a defect would be made. Rather that it would have to move to such an extent as to cause a 20 millimetre gap or alternatively have been rocking to a sufficient degree. The defendants did not challenge in cross-examination Mr McGlinchey's proposition that once the flagstone was loose it was inevitable that it would fail and become a danger. Furthermore, there was no evidence from the defendant to contradict that proposition or to state that it would have been difficult or overly expensive to have implemented a system of inspection for loose flagstones forming part of the steps and to relay those flagstones so that they were secure.

[21] Mr Black, the defendant's section engineer, was aware of the fact that flagstones forming part of steps needed to be bedded in concrete and knew, or at the very least ought to have known of the reasons for that. I find as a fact on the evidence that was presented in this case that the defendant knew or at the very least could reasonably be expected to know that the condition of the steps was likely to cause a danger to pedestrians if the bond between the concrete bedding and the cement flagstone was broken as evidenced by the flagstone moving. Accordingly on the evidence that I heard a sufficient inspection of the steps including the top row of flagstones would have included a visual check as to whether the flagstone had moved. This can be detected by an increase in the gap between the flagstones or for

instance if the grouting is still intact there being a gap between the edge of the grouting and the edge of the flagstone.

[22] If the missing flagstone was caused by this process of deterioration after a failure of the bond with the cement bedding followed by movement of the flagstone and it then breaking I consider that the defendants have not made out the statutory defence in Article 8(2) paying particular regard to all the factors in Article 8(3). The question then becomes whether it has been established on the balance of probabilities that this was cause. The alternative cause postulated on behalf of the defendant was vandalism. However, Mr McGlinchey, the plaintiff's consulting engineer, stated that there was no evidence of vandalism on this estate. That was not challenged in cross-examination and none of the defendant's witnesses gave evidence that there was any problem of vandalism either at the time of this accident or historically. The possibility remains that there could have been a singular incident of vandalism involving this particular flagstone or some very low degree of on-going vandalism so that it was not readily detectable. That may be possible but I reject it as probable. The photographs showed fairly dilapidated footpaths in the housing estate with the appearance that they had not had any major refurbishment works undertaken in relation to them for a considerable period of time. The process of the bond breaking has been clearly demonstrated on a set of steps in close proximity and of the same apparent age. I consider it probable that this was the cause of the flagstone becoming missing on the steps on which the plaintiff fell. Furthermore, I consider that prior to the flagstone breaking there would inevitably have been a period when there would have been a visible sign of it having moved and on the balance of probabilities, given the gradual nature of the process, that would have been prior to 6 July 2011 the date of the last inspection by the defendant's personnel. *On the evidence presented in this case* an adequate inspection on that date ought to have led to the defect being noted and the flagstone re-laid on a bed of cement.

[23] I consider that the defendant was in breach of its duty to maintain and that it has failed to make out the statutory defence in Article 8(2).

Contributory negligence

[24] The plaintiff could have but failed to see the missing flagstone. It was of such a size that he ought to have seen that it was missing. I found that he was guilty of contributory negligence and reduce the damages by 25%.

Conclusion

[25] I find in favour of the plaintiff and award £13,125.

[26] I will hear counsel in relation to costs.