Neutral Citation No. [2010] NIQB 22 | *Ref:* **GIL7760**

Judgment: approved by the Court for handing down | *Delivered:* **19/2/10**
*(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:

SCOTT CRAGGS (A MINOR BY HIS FATHER AND NEXT FRIEND KENNETH CRAGGS)

Plaintiff;

-and-

DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT

Defendant.

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GILLEN J

Background

[1] The plaintiff in this matter was born on 1 November 1991. On 15 August 2002 he was present in Tullymore Forest Park (TFP) with his father and his father's partner Ms Watkins whilst holidaying in Northern Ireland. Approaching some stone steps via a pathway composed of quarry dust in an area known as Azelea Walk it was the plaintiff's case that he felt his foot go into something causing him to trip, lose his balance and fall down the steps sustaining a nasty fracture to his arm.

The plaintiff's claim

[2] The defendant was the owner/occupier of TFP and was responsible for the maintenance and management of that site within the terms of the provisions of the Occupiers' Liability Act (Northern Ireland) 1957. The plaintiff alleges that his injuries were sustained by reason of the negligence, nuisance, breach of contract and breach of Section 2 of the Occupiers' Liability Act (Northern Ireland) 1957 of the defendant its servants and agents.

The plaintiff's evidence

[3] It was the plaintiff's case that there was a defect due to erosion at the top of the steps. He himself did not see the defective area but simply felt himself trip at the top of the steps.

[4] His father who was with him described the plaintiff lurching over at the time and he seemed to have tripped.

[5] Ms Watkins, who was present, remembered the accident occurring but she also did not see precisely what had caused the plaintiff to fall. It was her assertion that immediately after the accident she had visited the Ranger's Office in a hut in TFP and informed a man there that a terrible accident had occurred. She was unable to remember anything about this man but she claimed that he informed her that an ambulance would take too long and he advised her to take the boy to Daisyhill Hospital in Newry.

[6] Mr Craggs Senior gave evidence that his son was hospitalised between 15/19 August 2002. He returned to the park to report what had happened on 18 August 2002. When he arrived at the entrance hut he spoke to a park ranger with a Lancashire accent (undoubtedly Mr Marsden) and he explained what had happened as well as making an entry in the accident book. Thereafter Mr Craggs accompanied the ranger to the locus of the accident. Mr Craggs' evidence was that upon arrival he saw a large indentation at the top of the steps and identified this as the area where his son had fallen. Mr Craggs alleged that the ranger said "It is obvious erosion. It should have been sorted."

[7] Mr Craggs asserted that he thereafter took five photographs of the accident locus which were before me in court. A letter written by the plaintiff's solicitor some substantial period later suggested that the plaintiff had attended and taken the photographs on 16 August 2002. Having heard that solicitor give evidence before me I am satisfied that this reference to 16 8 02 was the result of a misunderstanding on the solicitor's part as to the instructions he had been given and that the mistake has no relevance to this case.

[8] The plaintiff called in evidence Mr Marrs a civil engineer who regularly gives evidence in these courts. He had inspected the locus on 21 May 2009. He also had before him the photograph taken by Mr Craggs. I pause to observe that it was common case that the defect as observed on 18 August /19 August 2002 -- described as 12 inches wide, 6 inches long and 2-3 inches deep -- was unacceptably dangerous.

[9] Mr Marrs made the following points on the plaintiff's behalf:

- The Royal Society for the Prevention of Accidents has issued a publication entitled "Parks and Open Spaces" (hereinafter called "the publication"). This publication was distributed long after the accident had occurred but it does set down recommended inspection regimes based on the number of facilities provided. In particular category B, which is defined as a park or open space having a three quarters of a mile catchment area providing 7/11 or more facilities and which matches TFP, is said to require weekly inspections as a minimum. The pathway/steps in this instance were inspected once per month.

- Mr Marrs was a regular attender at this forest park i.e. approximately twice per year for the last 20 years with his children and had used these steps.

- The pathway leading to the steps is made up of quarry dust. This is closely graded material made up of a loose surface of quarry dust set on compacted earth below. It is not a hard finish like tarmacadam or asphalt.

- Mr Marrs made the point that the proximity of this path to the steps created a potential danger far beyond the normal dangers attendant on flat paths in the forest itself and thus weekly inspection was important

- This engineer felt the defect had all the hallmarks of a hole made by water erosion over a period of some weeks and this ought to have been picked up at least on a weekly inspection prior to the accident.

Delay

[10] I pause to observe that this case is yet another example of where the passage of time between the date of the accident and the hearing has been the subject of delay. The delay in this case has not served well the interests of justice. It has in my view depleted the possibilities of accurate recollection of a number of potentially important conversations and observations e.g between Ms Watkins and the park rangers after the accident and between Mr Craggs and Mr Marsden on the 18 August 2002. This is a problem to which I have already adverted in Thornton v NIHE (unreported GIL7711) ("Thornton") and is bedevilling a number of cases in this Division. The system of case management that now operates in the Queen's Bench Division should address this matter and it is the duty of all professional representatives to ensure that cases are not allowed to move at anything other than an expeditious pace.

Credibility

[11] I made a number of comments in the Thornton case on the approach a court takes to assess credibility. At paragraph 13 I outlined the following as factors to be taken into account:

- The inherent probability or improbability of representations of fact.
- The presence of independent evidence tending to corroborate or undermine any given statement of fact.
- The presence of contemporaneous records.
- The demeanour of witnesses e.g. does he equivocate in cross-examination.
- The frailty of the population at large inaccurately recollecting and describing events in the distant past.
- Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication.
- Does the witness have a motive for misleading the court.
- Weigh up one witness against the other.

The system of Inspection

[12] I have come to the conclusion that it was neither negligent nor a breach of contract/statutory duty on the part of the defendant in this case to employ four weekly inspections of the locus of this accident. Whether an accident or event is foreseeable depends to some extent on past experience including the special expertise of a particular person. I heard evidence from a number of witnesses on behalf of the defendant, all of whom were extremely experienced personnel involved in forestry work. They included:

- Mr Nathaniel Watson, the District Forest Officer for East District in the Department of Agriculture who has 35 years experience in forestry management and first worked in TFP in 1975. He knows the locus well and sharply distinguished it from the core areas of, for example restaurants, toilet areas, caravan sites which need more frequent

inspection. Colour codes are adopted in TFP to guide people around the various routes and it was clear that if visitors are following an allotted route for the Azalea walk, they would not be going through this particular path. It is not a main thoroughfare and therefore inspection once monthly was sufficient in his view.

- Mr Marsden was the duty ranger employed by the Department in August 2002. He knows this area well and, echoing the view of Mr Watson, indicated that in his view these steps are rarely used. This is a man who was working in TFP daily at this time and would be in a strong position to give evidence on the frequency of use.

- Mr Parker the Recreation Officer in the Eastern Region of the Forestry Service with 32 years service in forestry work and 20 years experience in TFP, indicated that frequency of inspection is based on useage of the site. This was in his view an infrequently used set of steps and only merited monthly inspection. Tollymore Forest Park has 20-27 kilometres of marked trails and it simply is impossible to provide frequent inspection of every single trail. I observe at this stage that even had the publication applied at this time –which it did not – I do not believe it ever intended that every area in TFP, irrespective of the use invested in it, required a weekly inspection.

- Mr Hanna was a retired ranger and had worked in TFP for 49 years prior to his retirement in 2003. He made the point that not only is this area inspected monthly, but litter inspection in the summer often on a daily basis is another opportunity for any defect to be noted. He also was adamant that this particular path is only used by a few local people and if one did not know the park one would scarcely know it was there.

- Mr McMullan the Recreation Manager for TFP who has a diploma in forest management and 11 years experience at TFP with 21 years experience in forestry, who was well familiar with the area, indicated that he would have had input into the decision about inspection and given the infrequency of use, inspection at monthly intervals was more than adequate.

I was impressed by the demeanour of these men. Their evidence on the system of inspection was not based on speculation but carefully founded on a wealth of experience in forestry settings way beyond the expertise of Mr Marrs. Their evidence alone convinced me that monthly inspection of the locus was appropriate.

[14] I found independent corroboration of their assertions in the history of this locus between 1989 and 2002 which revealed no tripping accident at all.

Whilst this is not conclusive, nonetheless it is a factor that can be weighed in the balance when assessing frequency of inspection.

[15] Mr McLaughlin, the civil engineer called on behalf of the defendant, recorded that there was no vehicular traffic used in this area and no obvious water channel which would lead to erosion thus lending weight to the suggestion that there was no particular reason why more than monthly inspection is required.

[16] Ms McCombe, who carried out inspections on a monthly basis during the five years prior to the accident, recorded that during her routine inspections she had never come across any defect at this location. She claimed that she had inspected this precise location on 15 July 2002 and again on 17 August 2002 and found no defect on either occasion. I found Mrs McCombe to be a reliable and honest witness and I have no doubt that she did examine this area on 15 July 2002 and again on 17 August 2002 and on neither occasion found a hole or defect such as was found on 18 or 19 August 2002.

[17] Further independent evidence supporting the defendant's case was given by Mr McLaughlin on the nature of the fall of the steps relevant to this accident. He had measured the width of the path, the width of the steps (4 feet 8 inches) and the extent of the gravel path. He described it as typical of a flight of steps in an amenity area of this kind. The pitch of the steps was much less than one would normally find in a building i.e. the gradient was less than half that one finds in some public buildings. He did not regard this as an exceptional hazard and the going of the steps was so moderate that one was not likely to fall to the bottom even if one did trip.

[18] Moreover I find nothing about the quarry dust that creates any particular risk in this area. It seemed to be common case on the part of Mr McLaughlin and Mr Marrs that this type of quarry dust is regularly found in paths in forest parks. Mr McLaughlin described it as dense and relatively hardwearing. The experienced witnesses on behalf of the defendants e.g. Mr Parker made precisely the same point which I accepted.

[19] I therefore do not accept Mr Marr's assertion that there was a particular hazard here created by the proximity of the path to the steps which demanded more regular inspection than the monthly regime deployed in this instance.

Was it likely that the defect was caused by erosion? Would weekly inspections have made any difference to the likelihood of an accident in this instance?

[20] Mr Marrs' evidence was that the defect which was allegedly seen on 18 August 2002 by Mr Craggs but not by Mr Marsden and by Mr McMullan, Mr Marsden, Mr Parker and Mr Hanna on 19 August, was caused by erosion. Whilst he could not say what did cause it, Mr Marrs considered that water was a likely cause given that this location is where the grass meets the top of the steps. Quarry dust in his opinion was susceptible to water damage and at the hard face of the steps water would sit and cause accelerated erosion. The location was where the flow of water would exit from the grass. Gradual erosion over time would have been picked up on weekly inspection.

[21] I have come to the conclusion that I am not satisfied on the balance of probabilities that this defect was caused by erosion over a period of time or that the defect had been present for anything other than a very short time prior to the accident. My reasons for so determining are as follows.

[22] I was impressed by the point made by Mr McLaughlin that if this defect was a product of water erosion, there would be shallow channels eroded from the right to the left ie. on the downhill gradient. In any event in general terms one would expect natural erosion to be more to the centre than the periphery of this path. It is a relatively small hole with deep dimensions and not consistent with natural erosion. In short this is more of a hole than a channel made as a result of erosion. Mr McLaughlin considered it "most unlikely" that this had been caused by natural erosion and I tended to share his view. The absence of any signs of habitual water running across this area was significant in my opinion.

[23] His opinion was strengthened by the independent evidence he gave of likely rainfall in this area during the relevant period of 2002. The reports from the Meteorological Office of August 2002 recorded that this was the driest August month since 1995. Whilst of course there may be a variation in local rainfall, it does seem improbable that there could have been such a degree of rainfall at the accident location that this particular small area alone would have been eroded through rainfall. No evidence was given by the plaintiff of heavy rain at this time.

[24] In contrast the rainfall in August 2008 was described as exceptionally wet. However this had not produced any erosion or rain damage in this area. Why would such a heavy rainfall in August 2008 not cause a problem whereas the driest month for years in Northern Ireland would produce such a hole in 2002?

[25] I concluded there was merit to Mr McLaughlin's description of this hole as being of fresh origin based on the colour of the soil at the defect. Whilst it is difficult to place an interpretation on photographs, those that I observed that had been taken by the defendants on 19 August 2002 did seem to tally with Mr McLaughlin's description of brown soil or silt which was

damp and darker in colour because it had been so recently formed that it had not had time to dry out. The vertical face of the stone does appear relatively clean in those photographs and the damp area was consistent with relatively recent exposure not having had the chance to dry out. That all suggests a recent origin of this hole rather than the period of weeks suggested by Mr Marrs.

[26] On 18 August 2002, Mr Marsden accompanied Mr Craggs to the scene of the alleged accident. On 19 August 2002 he met Mr McMullan, Mr Parker and Mr Hanna at the scene. They all gave evidence that they had observed that there were loose stones immediately adjacent to the hole not only spread downhill (which would be consistent perhaps with erosion) but also highly significantly, uphill which would be an unlikely consequence of erosion. Why would stones have migrated from the hole uphill if it had been a downhill erosion? All of these witnesses were suspicious as to the origin of the hole and suggested that it appeared to have the hallmarks of being recently manmade. This of course would be consistent with the evidence of Mrs McCombe who had inspected the area on 17 August 2002 ie. two days after the accident, and allegedly found no defect at all.

[27] I make it clear that this is not to suggest that Mr Craggs was in any way responsible for causing the hole to be in this position when he arrived with Mr Marsden on 18 August 2002. I have no idea who caused this hole - was it children? - but the fact remains that it does have all the hallmarks of a manmade hole and when one couples this with the grave doubts I entertain about the likelihood of it having been caused by erosion, I am left unsatisfied that this hole was in existence at the time of the accident in this case. Consequently I therefore have come to the view that there is no satisfactory evidence before me that weekly inspections would have made any difference to the accident in this case. In short I am not satisfied that any or adequate evidence has been brought before me that the defect which was observed on 18 or 19 August 2002 was the defect that caused the accident to this plaintiff on 15 August 2002. In my view weekly inspections would thus have made no material difference to the occurrence of this accident.

[28] I pause to observe at this stage that reviewing the criteria to which I have already adverted in the case of Thornton, and applying it to the witnesses in this case, I was very impressed with the evidence and expertise of the defendant's witnesses. I found nothing to suggest that they were dissembling or misleading me in their evidence. As I have already indicated, the delay in the hearing of this case has not assisted the recollection of any of the parties. Mr O'Donoghue QC who appeared on behalf of the plaintiff, challenged both Mr Marsden's denial of a conversation that Mr Craggs claimed to have had with him at the scene of the accident on 18 August 2002, and the denial of the defendant's witnesses that Ms Watkins had spoken to rangers on the day of the accident in the TFP hut. The truth of the matter is

that far too long a time in terms of years has elapsed since this accident for such conversations to be accurately recollected by any of the parties and I was left in a state of uncertainty as to who was being accurate or completely truthful about these alleged conversations. In short this evidence did not assist me in coming to the conclusions that I have made in this instance.

[29] In all the circumstances I have come to the conclusion therefore that the plaintiff has failed to prove his case on the balance of probabilities and I therefore dismiss it.