Neutral Citation No. [2015] NIQB 109 | *Ref:* **BUR9741**

Judgment: approved by the Court for handing down | *Delivered:* **08/09/2015**
*(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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2013 No. 57358

BETWEEN:

KELLY ANNE FLYNN

Plaintiff;

-and-

MARIA CORR, DOMINIC CORR AND DAMIEN CORR

Defendants.

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BURGESS J

[1] This is an action for damages for personal injury, loss and damage arising from the plaintiff falling at or about 12.00 o'clock on 2 July 2010 while walking along the Antrim Road. She sustained a serious injury to her left wrist.

[2] Having listened to the evidence I am satisfied that the plaintiff tripped or stumbled on a defective surface at or about the point indicated by her outside premises known as "Patchwork Goose", Antrim Road, Belfast ("the premises").

[3] Title to the premises disclosed that they are in the ownership of the defendants, and subject to a tenancy to a Ms Pamela Anne Cullinan.

[4] The original title shows that the area on which the plaintiff fell formerly formed part of a walled garden to the front of the premises. This was a common feature to the adjoining terrace shops and premises along the Antrim Road.

[5] However it is abundantly clear from all of the evidence that these gardens, including the walls, had been removed a very long time ago, and had consistently

been used by pedestrians as part of an extended public footpath – that is not merely to gain access to premises adjoining that footpath. In addition all the evidence points to cars and other vehicles driving across the footpath area to park on these original garden areas immediately adjacent to the front of the premises and the adjoining premises.

[6] The lease to Ms Cullinan was made over 20 years ago. It was not available. Ms Cullinan clearly has been a model tenant throughout the years, making no demands on the landlords, including laterally the defendants, and in turn dutifully fulfilling her obligations. It is obvious, and I accept, that she never considered any part of the original garden to be part of the demise to her, or any part over which she had any rights or obligations.

[7] Ms Cullinan's evidence was helpful in that in addition to having been a tenant of the premises for some 22 years, she formerly had carried out her business in premises relatively close by. She was therefore able to indicate that the use of these particular areas, including the original garden area outside the premises, had been used as footpaths by the public. One of the defendants, Maria Corr, gave evidence. That evidence was that the premises were previously owned by her father and devolved to her and family members on his death. However she knew the premises long before Ms Cullinan took them, they formerly having been post office premises run by her father. She give evidence, which I accept, that throughout all of that period from when she was a very young child the area in question was part of the footpath and used by the public. In the skeleton argument filed on behalf of the plaintiff the time involved was described in terms as having been "historically in existence" as a public footpath.

[8] Having listened to the evidence I am satisfied that this area, in common with similar areas to the front of adjoining premises, were dedicated to public use by the respective owners many decades ago and the public have enjoyed continuous and uninterrupted use for that period of time.

[9] As I have stated the lease of Ms Cullinan was not available and this was a matter of criticism by Mr Higgins BL on behalf of the plaintiff. I believe that criticism misplaced. Ms Cullinan as I have stated was a model tenant. She paid her rent, the premises were kept to a proper standard and there has never been any occasion in my opinion where there has had the recourse to that original tenancy. The relevance of this was that a lease of adjoining premises described the premises demised as including an obligation to repair and upkeep "gardens". However the demise itself was described as "the ground floor premises" with no mention of a garden fronting the road, or indeed any area outside the actual building to the frontage of the actual building. That would be expected given the history of the use of that particular area – and I would have expected that at the time of the lease to Ms Cullinan since it already was being used for that purpose and indeed had done so for many years before.

[10] I believe that the form of lease which I was shown in respect of the adjoining premises is a standard formulae lease often used by letting agents and containing no more than "agents speak". It does not assist the plaintiff in any argument that there was a specific obligation under the lease to maintain and upkeep this particular area which would have evidenced responsibility accepted not just by the tenant but by the landlord by passing such an obligation to the tenant.

[11] Evidence was also given by Mr L Magill, consulting engineer, and by Mr Trevor Wright, consulting engineer, on behalf of the plaintiff and defendants respectively.

[12] A series of photographs were also produced showing an area of extremely uneven ground which the court has no difficulty in accepting would have been an obvious tripping point. The area in question was described as tarmac but in Mr Magill's opinion this had simply been thrown down onto what might well have been clay or soil, but certainly with no proper foundation being put in place of any nature let alone one which would satisfy the ordinary proper specification for public footpaths. He did not carry out any excavation of the area to ascertain exactly what, if anything, formed the basis for this tarmacked area. I do not criticise him in any way for that particularly in the context of his evidence that on what he was able to see, including what he argued was soil or clay, that no such foundations existed.

[13] If Mr Magill's argument is correct then the evidence of both engineers indicate that given the traffic over the area, particularly vehicular traffic, would have resulted in the deterioration very quickly indeed. This would have at first been gradual but certainly a five year period would have been as long as would have been required to reach a stage where the area would have been in the state shown in the photographs.

[14] The evidence of the defendants is that neither they nor their father during the period of his ownership carried out any work to this area whatsoever. Yet it is clear someone had carried out work. Ms Cullinan gave evidence of seeing a third party dumping a couple of bags of "black stuff" on the defective area a number of years ago, flattening it out with spades. Whilst vague I think it is fair for the court to conclude that from the description of the vehicle that she remembers seeing, it may well have been a member of staff of the Road Service.

[15] However other than the third party intervention there is no evidence but that from the time of the dedication of this area to the public use any work was carried out by the owners of the adjoining premises. On the evidence available to the court it is therefore my conclusion that the condition of the area arose by reason of non-feasance and not malfeasance on the part of the defendants.

[16] I am grateful to counsel for their skeleton arguments but I believe at the end of the day this is a classic Brady case. On the authority of that case and Gauten, and

based on the facts as I have determined them, the defendants owed no duty of care to the plaintiff and on that basis her claim must fail.

[17] While it is not necessary for me to make any determination in the light of the above conclusion, nevertheless the court would have to conclude that if the plaintiff had been able to recover damages for her injuries, the court would have held that she had contributed by failing to keep a proper lookout and to see an area which would have been patently clear in terms of its condition and its visibility and the lighting in the area. Exercising any proper duty of care she could easily have avoided this area and avoided therefore the obvious serious injury that she did .