

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

HELEN SMYTH

-v-

DRD

MORGAN J

[1] The plaintiff claims damages as a result of injuries sustained by her when she fell at a step at Bunbeg Park, Lenadoon, Belfast on 31 December 2001. Her claim was dismissed at the County Court on 14 December 2005 and she now appeals from the decision.

[2] The plaintiff said that she had been visiting her sister-in-law on the afternoon of 31 December 2001. She left at approximately 3:30 p.m. to make her way home. The route took her down 4 steps at Bunbeg Park. She did not use this route regularly although one could get access to the bus terminus by turning right at the bottom of the steps. On the bottom step she described her left foot going into a broken edge like a crack in the step. She fell on her left sustaining an injury to her left knee. She put her hand out to save herself but there was nothing on which to grip. She got herself up and looked to see what had caused her to fall. She was able to complete the five-minute walk home. She was then taken to hospital and treated with pain relief and a tight bandage to the leg. The medical evidence shows that she sustained an anterior bruising to her left knee that gave her months of discomfort.

[3] In cross examination she said that the weather was quite dry. There was no ice or frost. She had not noticed anything untoward about the steps. She said that the steps were rough. She was wearing trainers and felt her foot go in. She said that she did not misjudge the step. She said that the step had inconvenienced her.

[4] Evidence was given by the consulting engineer Mr McGill. He had inspected the locus on 22 November 2005 at which stage the area had been altered. He had been provided with photographs taken by the defendants showing a chip in the centre of the bottom step. It was difficult to estimate the width of the chip from the photograph. Relying on the photograph he was of the view that the depth of the chip was greater than 20 mm. He considered that the chip appeared to be weathered which indicated it had been exposed over time and he concluded that this would normally take in excess of six months.

[5] The departmental inspector had measured the width of the edge of the defect at 100 mm and he agreed with that measurement. The inspector had also measured the horizontal depth of the edge at 30 mm and he agreed with that measurement. The photograph suggested to him that the measurement of 16 mm for the vertical depth of the edge was inaccurate.

[6] He was aware of the departmental guideline that edges of this kind should be repaired where the chips were greater than 50 mm wide and 20 mm deep. He explained that the ball of the foot tended to balance close to the edge of the step so that if it was put off then there was a risk of falling. He further stated that an irregularity in the centre of the step was much more likely to give rise to difficulty than one at the edge of the step. The guideline requiring a depth of 20 mm had been taken from the Marshall report in the 1970s. He considered that it was not unreasonable for the department to follow the 20 mm guideline.

[7] Mr Sweeney of Roads Service said he met with the plaintiff at the scene of the fall on 21 March 2002. He measured the depth of the missing edge at 16 mm. He did not accept that the photographs suggested a bigger depth. He accepted that there was a bus terminus where passengers stopped round the corner but he did not know if passengers used these steps. He accepted that the footway in question was used regularly.

[8] It is common case that the footway in question is one which the department is under a duty to maintain. I also accept that the accident occurred broadly as alleged by the plaintiff. I further conclude that I should accept the evidence of Mr Sweeney as to the dimensions of the defect at the edge of the step. Mr McGill did not have an opportunity to inspect the defect and he accepted that the photographs were difficult to interpret.

[9] The liability of the defendant is derived from article 8 of the Roads (Northern Ireland) Order 1993 which provides:-

"8. —

(1) The Department shall be under a duty to maintain all roads and for that purpose may provide such maintenance compounds as it thinks fit.

(2) In an action against the Department in respect of injury or damage resulting from its failure to maintain a road it shall be a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove—

(a) that the Department 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; or

(b) that the injury or damage—

(i) resulted from works (other than works by or on behalf of the Department) carried out on or under that part of the road to which the action relates; and

(ii) resulted from an event which occurred before the completion of the re-instatement or making good of that part of the road in accordance with any relevant requirement.

(3) For the purposes of a defence under paragraph (2)(a) 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;

(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;

but, for the purposes of such a defence, it shall not be relevant to prove that the Department had arranged for a competent person to carry out or supervise the maintenance of the part of the road to which the action relates, unless it is also proved that the Department had given him proper instructions with regard to the maintenance of the road and that he had carried out the instructions. "

[10] The approach to this provision was helpfully set out by the Court of Appeal in *Frazer v DOE* 1993 No 8 NIJB. That court approved the approach adopted by Steyn LJ in *Mills V. Barnsley Metropolitan Borough Council*. The plaintiff must prove:

(a) The highway was in such condition that it was dangerous to traffic or pedestrians in the sense that, in the ordinary course of human affairs, danger may reasonably have been anticipated from its continued use by the public;

(b) The dangerous condition was created by the failure to maintain or repair the highway; and

(c) The injury or damage resulting from such a failure.

In dealing with this issue the relevant question was not was the defect potentially hazardous but was it dangerous to pedestrians in the sense that in the ordinary course of human affairs danger may reasonably have been anticipated from its continued use by the public. The fact that the defect caused the plaintiff to fall and sustain an injury does not condemn the edge as dangerous (see Mac Dermott LJ in *Doggett v DOE*).

[11] I take into account the explanation given by Mr McGill as to why a defect at the end of a step may have an impact upon the balance of a person using the steps. I accept the proposition that the existence of such a defect at the centre of the step is more likely to give rise to difficulty than a defect at the edge of the step. But I also have to take into account that Mr McGill accepted that the application by the Department of its guideline was not unreasonable. That answer reflected the particular circumstances of this set of steps in this location. On the basis of the evidence as a whole, therefore, I am not satisfied that this defect with a depth of less than 20 mm was dangerous to pedestrians in the sense that in the ordinary course of human affairs danger may reasonably have been anticipated from its continued use by the public.

[12] Accordingly I must dismiss the plaintiffs appeal.