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

Delivered: **10/1/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2011 No 090028

BETWEEN:

MARGARET McERLEAN

Plaintiff

and

THE RIGHT REVEREND MONSIGNOR AMBROSE MACAULEY AS NOMINEE ON BEHALF OF THE TRUSTEES AND THE BOARD OF GOVERNORS OF ST BRIDE'S PRIMARY SCHOOL

Defendant

HORNER J

Introduction

[1] On 3 December 2010, the plaintiff, then a teacher at St Bride's Primary School ("St Bride's"), slipped and fell on a snowy and icy footpath at Windsor Avenue while escorting a group of pupils to the chapel in Derryvolgie Avenue for choir practice. She suffered a nasty fracture to her left distal radius. She was off work for a number of weeks. The parties have agreed that her claim, if successful, is worthy of damages of £25,000. The issue for this court is whether the defendant, as her employer, is liable to compensate her for those personal injuries. The plaintiff claims that the defendant was guilty of breach of statutory duty and negligence in and about her employment.

[2] At the outset I should recognise the contribution the court has received from both legal teams and in particular from Mr Hunter QC for the plaintiff and Ms Simpson BL for the defendant. This case was keenly but fairly contested. What could be agreed was agreed and what had to be contested was fought vigorously but fairly. It was the model of how a personal injury action should be presented and defended.

Facts

[3] The following facts do not appear to be in dispute.

(i) The plaintiff was an experienced teacher in 2010 having taught at St Bride's for 22 years.

(ii) St Bride's comprises a split campus. There is one site at Derryvolgie for P1-P4 classes and another at Ashleigh for the P5-P7 classes. Both sites make use of the chapel further down Windsor Avenue on a regular basis.

(iii) The weather conditions that winter had been harsh. Snow had fallen in November and early December. The temperature on 3 December was at or about freezing point.

(iv) There had been many complaints in the newspapers that winter about the state of the footpaths in the Greater Belfast area. These arose out of the failure of the Council either to clear the footpaths or to apply grit and/or salt to them, it was claimed.

(v) While some schools had closed, St Bride's had not. The children made their way to Ashleigh and Derryvolgie both by foot and by car. Some of those children would have walked along the footpath at Windsor Avenue. Some would have been brought by car to the car park at St Bride's Church and they would then have walked along the footpath at Windsor Avenue to the Ashleigh building. Some older children would make the journey accompanied by their parents, some would make it unaccompanied. Some children would have been delivered at the entrance immediately outside either the Ashleigh campus or the Derryvolgie campus.

(vi) A risk assessment had been carried out at an earlier date (the precise date is unknown) in respect of the journey from Ashleigh to the chapel as this was a regular excursion for pupils and teachers at St Bride's. It is approximately 180 metres in length. The risk assessment concentrated exclusively on road traffic risks.

(vii) On 3 December 2010 the P5, P6 and P7 classes were scheduled to go to the chapel to practise for the forthcoming nativity play. This meant leaving the Ashleigh building at 11.00am and walking along the footpath on Windsor Avenue to the chapel.

(viii) The Headmaster had walked almost the entire length of the footpath up to the chapel to assess whether or not the footpath was safe to allow the pupils and teachers to use. He had concluded that the footpath was passable with care

and that the trip to the chapel could go ahead. The plaintiff did not agree. She complained in no uncertain terms that it was foolish to undertake such an excursion given the weather conditions. The Vice-Principal, Mr Kelly and the senior teacher, Ms Joyce, now the Vice-Principal, agreed with the assessment of the Headmaster. However, in deference to the plaintiff it was decided to limit the numbers to those who were involved in the nativity scene, rather than the 100 pupils who it was originally intended to take to the chapel. This meant that only 48 pupils were required to make the trip that morning.

(ix) The plaintiff was considered to be essential as she was required to conduct the choir.

(x) The pathways linking the two campuses had been cleared of snow and ice and were gritted and salted. They lay within the control of St Bride's. The pupils were not permitted to play in the playground because of conditions under foot. The Headmaster considered that the risk of an accident posed by unstructured play on such a surface was too great.

(xi) The pupils were accompanied on their walk along the footpath of Windsor Avenue by the Vice-Principal, Mr Kelly, Ms Joyce, Ms Granleese, another teacher, and the plaintiff. Of those who made the walk, only the plaintiff and Ms Joyce gave evidence.

(xii) The plaintiff slipped as she made her way along Windsor Avenue on the footpath and fell heavily fracturing her forearm.

(xiii) The plaintiff returned with the pupils to whence she came and then went onto the hospital for treatment.

(xiv) Subsequently the teachers and pupils made the same journey along the footpath when the concert did take place on 22 December 2010. There had been a postponement from 17 December 2010 as a consequence of the heating breaking down. The court was told that the conditions on 22 December 2010 and before, were similar to 3 December. The journey from Ashleigh to the chapel was made by pupils and teachers on 22 December 2010 without incident.

[4] There were a number of matters which were in dispute or not agreed.

(i) The plaintiff said that snow had fallen that morning. The Headmaster thought that it had fallen during the night. He could not recollect precisely when it had fallen.

(ii) The plaintiff claimed that before she fell a pupil had slipped and fallen on the footpath. It was put to the plaintiff that Ms Joyce had no recollection of such an incident. Ms Joyce gave evidence to that effect.

(iii) The plaintiff said that Ms Joyce had exclaimed after the fall that it would now be necessary to carry out a risk assessment. Ms Joyce said that she could not remember saying anything of that nature.

(iv) There were a number of reasons advanced as to why the practice had to take place on 3 December 2010. These included a requirement that the pupils had to see how they were going to be organised in the church, where the musical instruments were going to be positioned and where the performers were required to sit. I accept that these arrangements were essential for the production of the forthcoming nativity play. The plaintiff's point is that the visit could have been rearranged for some other date. It is accepted that it was possible to rearrange the pupils' visit to the chapel but this would have proved difficult and inconvenient because of the retreats which were being held following week on different days involving the different classes.

[5] I am not sure a lot turns on these disputes. It is common case that the footpath was slippery as a consequence of the presence of snow and ice. If a pupil did fall on the walk to the chapel, it is significant that it was neither pleaded nor suggested that it called for a reassessment of the risk. I conclude that a pupil did slip but it was not such as to give rise to any concern among the accompanying teachers. Whether Ms Joyce said after the plaintiff's accident that a risk assessment was necessary or not, the undisputed fact is that the Headmaster had carried out one immediately before the accident had taken place. Finally, although it might have been possible to rearrange practice for those pupils who walked to the chapel on 3 December on some other date, as I have recorded it was undoubtedly much more convenient to hold it on that particular morning and in any event there was no guarantee that the weather conditions would improve before the play was due to take place.

[6] The central issue remains. Was the defendant in breach of its duty to the plaintiff by requiring her and the other teachers and the 48 children in their care to make their way along the public footpath of Windsor Avenue to the chapel on 3 December 2010?

The Witnesses

[7] The plaintiff had been a teacher for many years. I thought that she was doing her best to assist the court when she gave her sworn testimony. The same applies to Ms Joyce who is now the Vice-Principal of St Bride's and who presents as a dedicated teacher as well. Mr Carswell, the Headmaster, was a most impressive witness. I thought he gave his evidence very fairly and objectively. It was obvious

from the way he gave his testimony that he is someone who thinks about matters and that when he does make a decision, it is the mature product of careful reflection.

Legal Principles

[8] It is important to determine what the proper legal principles are in this case where negligence and breach of statutory duty are both pleaded. It is especially so when the accident occurred, not on the defendant's premises, but on a public highway. However, importantly, the accident happened while the plaintiff was in the course of her employment. The defendant, as her employer, owed to the plaintiff a non-delegable duty to exercise reasonable care for her safety: see McDermid v Nash Dredging and Reclamation Co Ltd [1987] AC 906. Very often this duty of care is divided into various components, e.g. place of work, system of work and work equipment. In Wilson v Tyneside Window Cleaning Co [1958] 2 QB 110 Pearce LJ said at page 121:

> "Now it is true that in Wilsons & Clyde Coal Co. Ltd. V English [1938] A.C.57,78 Lord Wright divided up the duty of a master into three main headings, for convenience of definition or argument; but all three are ultimately only manifestations of the same duty of the master to take reasonable care so to carry out his operations as not to subject those employed to unnecessary risk. Whether the servant is working on the premises of the master or those of a stranger, that duty is still, as it seems to me, the same; but as a matter of common sense his performance and discharge will probably be vastly different in the two cases."

Parker LJ said in the same case at page 124:

> "That general duty applies in the circumstances of every case; but the governing words *reasonable care* limit the extent of the duty to the circumstances of each case. Accordingly, the duty is there, whether the premises in which the workman is employed are in the occupation of the master or of a third party, or whether the tool has been made to the order of the master or his manager, servant or agent, or is a standard tool supplied and manufactured by reputable third parties; but what reasonable care demands in each case will no doubt vary".

[9] Accordingly, the fact that the accident happened on a public highway does not remove the duty of reasonable care owed by the defendant to the plaintiff. But

the standard to be applied to the defendant's own premises will necessarily be very different to that applied to the public highway. While it might be a breach of an employer's duty not to grit paths on premises within its control, it might not be a breach to require an employee to use an un-gritted public footpath. It depends on "all the circumstances".

[10] There will be no liability if there is no real risk to employees acting with sufficient care: see Jaguar Cars Ltd v Alan Gordon Coates [2004] EWCA Civ 337 at paragraph 11 where Tuckey LJ said:

> "I cannot see that these steps pose any real risk provided those using them exercise a degree of care to be expected by anyone going up or down stairs. It does seem to me that the judge has equated his finding of foreseeability of risk with a finding that there was a duty to provide a handrail, but one does not follow from the other."

[11] A frequent complaint is made that the present risk averse culture makes it difficult for schools and other institutions to carry out many activities that they had carried out in the past. Reasonable care does not guarantee there will never be a risk of injury or that every risk will be avoided or that there will never be an accident. Matters other than foreseeability have to be weighed in the balance, including the magnitude of the risk, its obviousness, the previous experience of running that risk. It is what is reasonable "in all the circumstances". All activities necessarily carry a risk and it is important that institutions such as schools do not abandon a worthwhile activity simply because there is a risk of injury. To suggest that an employer should not require an employee to carry out an activity because there is a foreseeable risk of injury is to misunderstand the nature of the employer's duty of care. The foreseeability of risk of injury is one of a number of circumstances that has to be taken into account by an employer in order to ensure that he can exercise reasonable care "in all the circumstances". Furthermore, in deciding what constitutes reasonable care, there is often not just one course of action which equates with what is reasonable in "all the circumstances". There may be a range of choices available to the reasonable employer. In such a situation, if he makes a choice, and ultimately an employee is injured, that does not necessarily make that choice a careless one simply because if another choice had been taken, no injury would have occurred.

[12] At this point it is necessary to draw attention to the fact that a court may under Section 1 of the Compensation Act 2006 take into account whether by taking precautions against the risk or otherwise, it may result in the prevention of a desirable activity being undertaken "at all, to a particular extent or in a particular way" or "discourage persons from undertaking functions in connection with a desirable activity". There is no doubt that practising for a nativity play or taking part in choir practice is a desirable activity. However, I have to agree with the

comments of Field J in Uren v Corporate Leisure (UK) Ltd [2010] EWHC 46 at paragraph [19] when he suggested that Section 1 "adds nothing to the common law".

[13] The statement of claim refers to breaches of statutory duty, and in particular breach of Regulation 3 of the Management of Health and Safety at Work Regulations (NI) 2000 which states that:

> "Every employer shall make a suitable and sufficient assessment of –
>
> (a) The risks to the health and safety of his employees to which they are exposed whilst they are at work …
>
> For the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him **by or under the relevant statutory provisions**." (Emphasis added).

Regulation 22(1) states that breach of duty imposed by this regulation shall not confer a right of action in any civil proceedings. But this was amended by the 2006 Regulations which added "in so far as that duty applies for the protection of a third party".

[14] The plaintiff relied on Regulation 5 of the Workplace (Health, Safety and Welfare) Regulations (NI) 1993 which state that:

> "(1) The workplace and the equipment, devices and systems to which this regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair."

It was pointed out the definition of workplace under Regulation 2 excludes any public road.

[15] It is significant that the risk assessment which has to be carried out under Regulation 3 of the 2000 Regulations relates not just to the workplace but to the risks tothe employee whilst he is "at work". Ms Simpson for the defendant pointed to the definition of "preventative and protective measures" which are defined under Regulation 1(2) as meaning –

> "The measures which have been identified by the employer or by the self-employed person in consequence of the assessment as the measures he needs to take to comply with **the requirements and prohibitions**

> **imposed upon him by or under the relevant statutory provisions** …" (Emphasis added).

No statutory provision was drawn to my attention which would specifically require this employer to carry out a risk assessment in respect of a public road because it provided access to the plaintiff's place of work from time to time. It is easy to see why a risk assessment relating to the use of a public road might be necessary to ensure compliance with "relevant statutory provisions" where, for example, Regulation 4(1) of the Personal Protectionat Work Regulations (NI) 1993 came into play. This requires every employer to ensure that suitable personal protective equipment is provided to employees. This might require, for example, an employer whose employee has to carry out work on public roads to carry out a risk assessment to see whether, for example, high visibility clothing is necessary for that employee in order to ensure that he is not placed in danger in the course of carrying out his work.

[16] The public road has been excluded as a workplace, I surmise, because it is not within the control of an employer and in any event there is a statutory responsibility on the relevant public authority to ensure that it is properly maintained: see Article 8(1) of the Roads (NI) Order 1993. However, that is by no means the end of the matter. I do consider that risk assessments are now such a feature of today's health and safety culture that under the common law a reasonable employer might in certain circumstances be guilty of lack of reasonable care if that employer failed to carry out a risk assessment which included a public road which the employee had to access in the course of his or her employment.

[17] In Allison v London Underground Ltd [2008] PIQR page 10 Smith LJ said in respect of Regulation 3 of the 1999 Regulations (the English equivalent) at paragraph 57 that risk assessments are necessary to identify, evaluate and minimise risks arising out of the employer's operations.

[18] In the later case of Steven Threlfall v Hull City Council [2011] PIQR page 3 at paragraph 35 Smith LJ went somewhat further when she said:

> "For the last 20 years or so, it has been generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with his operations so that he can take reasonable precautions to avoid injury to his employees. In many circumstances, a statutory duty to conduct such a risk assessment has been imposed. Such a requirement (whether statutory or not) has to a large extent taken the place of the old common law requirement that an employer had to consider (and take action against) those risks which could be reasonably foreseen. The modern requirement is that he should take positive thought for the risks arising from his operations.

> Such an assessment is, as Lord Walker of Gestingthorpe said in Fytche v Wincanton Logistics plc [2004] UKHL 31 *logically anterior* to the taking of safety precautions. I said something similar, in rather less eloquent language at paragraph 58 of Allison v London Underground Ltd [2008] EWCA Civ 71."

[19] There is force in these dicta. Indeed there are good grounds for concluding that regardless of the statutory obligations of the defendant, a reasonable employer would have considered that a risk assessment was necessary where teachers had to escort pupils along Windsor Avenue when there was snow and ice present on the footpath. In other words in assessing "what is reasonable in all the circumstances" it was incumbent upon the defendant as a reasonable and careful employer exercising reasonable care to identify, assess and evaluate the risks of that route. This included a public road that provided access to the place to which the teachers (and pupils) had to travel in order to carry out their duties.

Conclusion

[20] There is always going to be a risk in using a public footpath, even if it is only the risk of tripping and losing balance because of an uneven surface. Necessarily there will always be a risk of slipping and falling on a footpath if it is frosty and/or snow has fallen. But this foreseeable risk of slipping and/or falling does not make the footpath unsafe. If this was the position, then any frost would place a footpath out of bounds to pupils and teachers and preclude travel from Ashleigh to the chapel. Indeed any school would face a difficulty in its teachers and pupils using a public footpath as a means of access during such conditions. Furthermore, employers would be reluctant to permit their employees to use a footpath in the course of their employment when there was frost or snow because of the responsibility that they might bear if any of their employees slipped or fell. In this case the Headmaster was in a good position to make an assessment of the safety of the footpath and whether it was safe for the pupils and the teachers at St Bride's to use it because he had inspected almost its entire length shortly before the plaintiff, the other teachers and the pupils commenced their passage to the chapel. I reject the criticisms made by Mr Hunter QC of the risk assessment carried out by the Headmaster. I consider that it was made at an appropriate time and this allowed the Headmaster to assess the actual conditions. I do not consider that a more formal assessment would have produced a different result. The fact that the plaintiff reached a different view to the Headmaster is also an important consideration. But just because she had concluded that it was dangerous and then fell, does not prove her case. All the evidence has to be considered. This includes:

(a) The Headmaster carried out a risk assessment almost immediately before the walk took place resulting in his conclusion that the footpath was "passable with care".

(b) He was supported in his conclusion by the Vice-Principal and the senior teacher.

(c) Many parents had reached a similar view. The evidence established that many parents were sufficiently confident to allow their children to walk along the footpath unaccompanied from the car park along Windsor Avenue to Ashleigh.

(d) There was no history of falls or accidents on the footpath before the pupils and teachers set out.

(e) The risk of slipping and falling was obvious to all.

[21] The court cannot say what risk assessment it would have made because it did not inspect the footpath on the day in question. The duty of the defendant was to exercise reasonable care in all the circumstances. The fact that the plaintiff fell does not mean that the Headmaster was careless in his assessment. I find, having heard the Headmaster and the other witnesses, that he was entitled to conclude that passage along the footpath was safe immediately following his inspection, provided that caution was exercised. I accept that a different headmaster could have reached a different conclusion. However this does not make this Headmaster, and the defendant who is vicariously liable for him, negligent. Of course, the Headmaster did see that there was a risk but it was an obvious one and having considered the actual conditions, he satisfied himself that such a risk could be managed and the teachers and their pupils could make their way safely along Windsor Avenue. It is common case that all the teachers did exercise care and no criticism is made of the plaintiff. In the events that happened, the plaintiff simply slipped and fell without any fault on her part. This was a most unfortunate accident. But the plaintiff's fall did not mean that the risk assessment had been carried out carelessly or that the Headmaster exercised a lack of reasonable care. In those circumstances I find that the plaintiff has failed to prove that the defendant was guilty of negligence and/or breach of statutory duty to the requisite standard.

[22] I can well understand the frustration and annoyance of the plaintiff. She thought on the morning of 3 December 2010 that the footpath was unsafe. She voiced her opinion in trenchant terms. No doubt she feels her fall has vindicated her opinion. But all activities involve an element of risk. Accidents do happen. On the facts that I have heard, I reluctantly conclude that this was a simple accident, which occurred without legal fault on the part of her employer, his servants and agents.