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

Delivered: 14/03/16

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2012 No. 114817

BETWEEN:

ANGELA McCLUSKEY

Plaintiff

-and-

ST PATRICK'S ARCHDIOCESAN TRUST LIMITED

Defendant.

KEEGAN J

[1] The plaintiff is a 66 year old retired woman. On 7 December 2010, when the plaintiff was 61, she slipped and fell on the premises of St Malachy's Church, Lower Irish Street, Armagh. The incident occurred at 10.30 am on a Tuesday morning. The plaintiff had called at the church to light a candle to mark the anniversary of the death of her niece. This incident occurred during a period of extremely cold weather in Northern Ireland characterised by snow, ice, fog and sub-zero conditions during both the day and the night.

[2] The plaintiff sustained an injury to her right knee. She suffered a low velocity dislocation and complete disruption of most of the major ligaments of the knee including the anterior and posterior cruciate ligament and the lateral ligament complex. The plaintiff required hospital treatment. She was treated by way of a simple closed reduction of the knee joint and she underwent surgery. An open reduction and repair of the lateral ligament structure was carried out and an external fixator was applied to the right leg. The plaintiff was in hospital at Craigavon Area Hospital and then at the Royal Victoria Hospital from the date of this incident until 22 December 2010. The plaintiff was readmitted to hospital on 21 January 2011

when the knee fixator was removed from the right leg. Thereafter the plaintiff did recover in an unremarkable way for this type of injury. The plaintiff has mature scars on her leg associated with the surgery. She has some sensitivity in these areas.

[3] The plaintiff claims against the defendant for personal injuries, loss and damage sustained by reason of the negligence and breach of statutory duty of the defendant, its servants and agents in or about the upkeep, supervision, safekeeping, care and control of St Malachy's Chapel, Armagh, the locus of the incident. The plaintiff was represented by Mr Mooney QC and Mr McCombe and the defendant was represented by Ms Simpson QC. Liability was not admitted and the quantification of any damages was also at issue. I am grateful to all counsel for their presentation of this case and for their submissions which have been of considerable assistance to the court.

[4] At the outset I should say that much of the factual background was uncontroversial. It was accepted that the plaintiff fell whilst a visitor to the church. It was also accepted that this was an extremely cold morning, that there was snow/ice on the ground and that the temperature even at 10.30 am was probably sub-zero.

[5] The plaintiff described her personal circumstances in evidence. She said that she had worked throughout her life at St Luke's Hospital, Armagh as a cleaner and that she was also a dinner lady at her local school. She explained that she was now retired. She said that she was married with four grown up children. The plaintiff explained that both St Malachy's Church and Armagh Cathedral were within the area in which she lived and that she had attended both on occasions. The plaintiff explained that one week before the incident she attended her daughter's wedding at St Malachy's Church.

[6] On the day in question the plaintiff chose to visit St Malachy's instead of the cathedral because she was concerned about walking up the cathedral's many steps. The plaintiff described that there was snow on the ground when she went out that day. Her husband drove her the short distance from her home to St Malachy's Church. She was wearing flat shoes. Her husband dropped her outside the gates. She walked a short distance over ground to the left pedestrian gate. The plaintiff indicated that the ground conditions getting to the gate from the car were passable.

[7] The plaintiff described that she "just went down" when inside the church premises. She said that her feet slipped from under her as a result of ice. The plaintiff found it difficult to describe exactly how she fell as she had experienced a loss of consciousness. The plaintiff recalled seeing two men at the door of the church when she fell. She knew one of these men was Michael Toner, the groundsman. The men came to her aid and an ambulance was called for her. Another woman who was passing by and who was later identified as Mrs Donnelly also came to the plaintiff's aid.

[8] The plaintiff described lying on the ground waiting for the ambulance and being in pain and going in and out of consciousness. The plaintiff did not particularly remember getting to hospital but she remembered the fact that she had to have surgery and a cage put on her leg. She described the embarrassment she felt at not being able to tend to her personal needs. The plaintiff described being relieved to be released from hospital. She was in a wheelchair at first and then she learnt to walk with a stick. The plaintiff described how the family adapted the downstairs living room in her home into a bedroom when she first arrived home and how they had to assist her with her personal care. The plaintiff described subsequently moving to a bungalow. She attended physiotherapy which assisted her but she now has to use a walking stick and she has limitations to her mobility.

[9] The plaintiff described feeling cramping type pain in her leg if using it for long periods. She also described stiffness on occasions. The plaintiff explained that her husband is ill. She said that the incident has triggered a loss of confidence in her and she does not go out as much as she used to. The plaintiff accepted that prior to the incident she did have health problems after having had a heart attack and a condition associated with asthma.

[10] The medical reports also refer to the plaintiff's previous history. Mr Corry, consultant orthopaedic surgeon, opined in his report of 30 June 2015:

“Before and after the injury her mobility was limited and therefore in the absence of degenerative change in the articular surfaces at present, it is unlikely that she will go on to develop osteoarthritis. Her main medium to long term disability has been stiffness and pain especially after prolonged immobility. The instability associated with ligament laxity has not been a major problem. She has had areas of hypersensitivity on the lateral side and altered sensation also on the lateral side of the dorsum of the foot. Her present condition is likely to remain the same for the foreseeable future. I would not anticipate significant deterioration with time.”

[11] Mr McClelland, consultant orthopaedic surgeon, in his report of 5 August 2012 refers to the fact that the plaintiff has longstanding medical problems including severe chest and heart disease. He opines that her mobility is probably more limited than she was prior to the injury although he notes in a previous medical report that she only had a walking distance of about 150 yards prior to this fall. Mr McClelland in his follow up report of 2 September 2015 states that the plaintiff had significant disability prior to her fall and that arthritic change is unlikely as there is no significant weight bearing on the knee joint.

[12] I found the plaintiff to be an honest and straightforward witness. She accepted her past medical history which is not insignificant. Understandably, she could not recall exactly how she fell on the day in question but she did describe the extreme cold and the fact that her feet went from under her. The plaintiff described the effect this injury had had upon her confidence in a compelling way.

[13] Mrs Muriel Donnelly also gave evidence on behalf of the plaintiff. Mrs Donnelly lives outside Armagh and she is a carer by occupation. She said that she knew St Malachy's Church as she sometimes attended it. She was out that morning on her way to work having completed the school run. Mrs Donnelly did not know the plaintiff but whilst waiting in traffic outside the church, she observed the plaintiff fall. Mrs Donnelly described pulling her car into the side of the road and going to the plaintiff's aid. This lady then stayed with the plaintiff until the ambulance arrived.

[14] Mrs Donnelly described there being snow at the side of the road where she had stopped her car. She described entering the church through the left pedestrian gate, the same gate the plaintiff had entered through. She said that she found the conditions very slippery there and she almost lost her footing. She went to the plaintiff's aid and described her as drifting in and out of consciousness and that her leg was twisted. Mrs Donnelly saw a man she knew as Mr Michael Toner come over to the plaintiff from the front steps of the church. Mrs Donnelly stayed with the plaintiff some 20 minutes whilst waiting for the ambulance. In answer to Ms Simpson QC in cross-examination Mrs Donnelly said she could not recall slush or snow at the site of the accident. She said that there was ice and that it was very slippery under foot. It was not snowing at the time.

[15] Mr McLoughlin, consulting engineer, then gave evidence on behalf of the plaintiff. Mr McLoughlin is a qualified chartered civil engineer who has been in practice since 1988. He explained that his report was a desk top report because the surface inside the grounds at St Malachy's Church had been replaced. At the time of the incident the church concourse was paved with limestone slabs. Mr McLoughlin pointed to promotional material he had uncovered showing the church with these slabs described as "Armagh limestone slabs". His research uncovered that these slabs were laid down as part of an overall refurbishment of the church in 2002. Mr McLoughlin opined that while he had not inspected the stone, that it is generally similar to Portland Stone, commonly used in prestige limestone paving. He said that this type of stone was considerably smoother than the tarmacadam which replaced it. Hence he thought that it would be more slippery than tarmacadam when wet but it was not prone to the extreme slipperiness that can affect some types of slate in wet conditions.

[16] Mr McLoughlin referred to the very cold weather conditions at the time of this incident. He exhibited the Met Office Northern Ireland diary for December 2010. This described that on 6 December 2010 there was occasional heavy snow followed by clearing skies and ice. On 7 December 2010 there was a dry start with

patchy freezing fog and severe frost, the temperature at Castlederg having fallen to minus -14.5 degrees centigrade.

[17] Mr McLoughlin described the dimensions of the paved area at the time of this incident as 170 square metres with a much larger area of adjacent car park. He opined that it would have been possible to grit a path purely for pedestrians entering via one of the pedestrian gates up to the front entrance by treating 40 square metres of surface.

[18] Mr Mc Loughlin referred to the use of de-icing salt and its effectiveness. He referred to a Winter Service Guide for Local Authority Practitioners. He referred to the use of 40 grammes per square metre of salt, combined with the action of traffic being equivalent to melt snow depths of 10 mm at -2 degrees centigrade. With regard to snowfall, he referred to the fact that snow should be removed before de-icing is attempted. A de-icer should not be spread alone without abrasives (grit) to anything other than a thin layer of ice or compacted snow because applying salt alone could produce a dangerously slippery condition if a layer of brine is formed on top of the snow layer. Mr McLoughlin said that salt is effective down to minus -7 degrees centigrade.

[19] Ms Caherty gave evidence on behalf of the defendant. She said that she was appointed as a business finance manager for St Patrick's Cathedral Parish on 1 March 2009. She said this role covered four churches including St Malachy's. She accepted that her role included managing issues such as adverse weather. St Malachy's employed Mr Michael Toner as a groundsman/gravedigger and Mr Tommy McKenna as a sacristan. She said that Mr John Gribben was also employed at the cathedral three quarters of a mile away and that both Mr Toner and Mr Gribben were instructed to do snow work. It was clear that there is a cross-over of staff between the two churches given their proximity. Ms Caherty said that the groundsmen worked from Monday to Friday 8.00 am to 5.00 pm.

[20] Ms Caherty frankly accepted that there was no formal system in place at the date of the incident to manage the church grounds. She accepted that there was no rota and no risk assessment. Ms Caherty also indicated that she was off work at the time of the incident. In fact she had left her work six months after taking on her new role as she had suffered from ill-health. There was no replacement for Ms Caherty when she was off and so no one was doing the job of managing the church premises. The church was opened every day at 7.30 am. Mass was every day at 8.00 am and 7.30 pm in addition to Sunday Masses. An Adoration Chapel was available 24 hours a day through a dedicated entrance but the main church gates were closed each evening after Mass and opened again at 7.30 am in the morning. Ms Caherty accepted that the limestone paving which was in place at the date of the incident was now replaced. She said that plans were in place to do this when the plaintiff fell. She said that the reasons for replacing the limestone slabs were the fact that vehicular traffic was cracking stones at the entrance to the church and also that they were unsafe when wet.

[21] Ms Caherty accepted that there were no warning signs during wintery weather erected at the church but warning signs were used inside the church when wet or slippery conditions were apparent inside the church. Ms Caherty referred to the fact that de-icing salt was available at the church premises for use by the groundsmen. She referred to an invoice which showed a delivery of de-icing salt in October 2010. She also referred to a delivery docket for 2011 which showed a salt delivery but also a pinhead stone delivery of grit.

[22] Ms Caherty referred to the fact that there were no other reported slips on the ice/snow during the period of weather but she accepted that there was no incident/report book. She said that she had telephoned the insurers to check the position. Ms Caherty accepted that ice would create a foreseeable risk of someone slipping. She did not make the case that resources hampered the defendant in making the premises safe.

[23] Mr Michael Toner, groundsman/grave digger gave evidence. He said that he organised his own duties with Mr Gribben the other groundsman. He said that the day before the incident he salted the area at 4.00 pm before he left. Mr Toner was not specific about the exact area salted. He said that when he did salt it was on snow. Mr Toner made no mention of clearing a path. On the morning of 7 December 2010 he arrived at 9.00 am at work. He said that there was a fair bit of snow. He said that he started to clear it but he was concentrating on the steps of the church and had not gone near the entrance or the pedestrian gates. The next thing was he heard a woman screaming and so he went to her aid. That was the plaintiff who he assisted. Mr Toner accepted that there were no warning signs in relation to the ground conditions. He said that Mr Gribben was at the graveyard so he could not have helped clear the area. Mr Toner accepted that there may not have been much activity at the graveyard that day. Mr Toner accepted that compacted snow could make the ground more dangerous. He further accepted that there was no inspection or salting on the morning of 7 December 2010.

[24] Mr McKenna, the sacristan also gave evidence. He said that he opened the gates of the church that morning. He said that he was talking to Mick (Mr Toner) when he heard the plaintiff scream. Mr McKenna accepted that salt was available to the groundsman because he said that it was stored in the boiler house. He accepted that he did not salt the ground in the morning. He thought that most people walked through the car entrance not the pedestrian entrance. He said that the emphasis was on getting the church steps cleared and that the pedestrian entrance was something that the staff intended to clear or salt but they had not got round to it.

[25] This case involves a consideration of the duty owed by the defendant as an occupier of the church premises to the plaintiff as a visitor to the church. The duty is to take reasonable care. This is the duty at common law and also that contained in the Section 2 of the Occupiers' Liability Act (Northern Ireland) 1957. Section 2 of the Occupiers' Liability Act reads as follows:

“Extent of occupier’s ordinary duty

(1) An occupier of premises owes the same duty, the ‘common duty of care’, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”

[26] Ms Simpson QC referred me to the law in this area. I have considered the authorities and the principles set out in Clerk and Lindsell on Torts 21st Edition particularly at Section 12-29. As the examples in Clerk and Lindsell demonstrate, the factual circumstances of the cases in this area are many and various. It also follows that whilst there are different factors to be taken into account, there is no set checklist principally because each case will depend on its own facts.

[27] In this case the evidence was uncontroversial about the fact that it was reasonably foreseeable that someone would slip on the paving stones in icy/snowy conditions. The real issue seems to me to be whether the defendant in all the circumstances took reasonable steps to ensure the safety of the visitors such as the plaintiff. In conducting this exercise I take into account the nature of the defendant as a small entity, operating an ad hoc system but nonetheless providing a service to members of the public.

[28] I was referred to a decision of McErlean v Macaulay [2014] NIQB 1 wherein Horner J found that liability was not established in circumstances where there was an injury sustained as a result of an icy surface in and around the same timeframe as this incident occurred. Obviously as I have said each case turns on its own facts. The Mc Erlean case involved an accident sustained by a teacher on a public footpath in the course of her employment. Horner J at paragraph [9] of the McErlean decision says:

“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’.”

[29] The McErlean case is clearly different on the facts as it involved a consideration of the duties owed to an employee by an employer and in particular the issue of risk assessment. There is now a recent Supreme Court decision of Kennedy-v- Cordia (Services) LLP (Scotland) 2016 UKSC 6 which clarifies the law in this area. In any event, the plaintiff's case involves a consideration of the specific duties placed upon an occupier to keep premises reasonably safe for a visitor and so these authorities are not directly relevant.

[30] The case of Laverton v Kiapasha t/as Takeaway Supreme [2002] EWCA Civ. 1656 was also referred to. This case does involve occupier's duty. Hale LJ delivered the lead judgment (Mance LJ dissenting). The Laverton case was about a woman who sustained injuries in the defendant's takeaway shop one evening after slipping on water. This case must be viewed on the individual facts and there was an obvious issue in relation to contributory negligence. However some core principles are stated by Hale LJ as follows.

[31] At paragraph [16] Hale LJ says as follows:

"The occupier's duty of care is the same in all cases but its application depends, crucially, upon 'all the circumstances' of the particular case before the court. He has to take reasonable care to see that the visitors are reasonably safe. He does not guarantee their safety."

At paragraph [20] Hale LJ also says this:

"The question is what was reasonable to expect of the defendant in the particular circumstances of this case and whether anything else would have made a difference."

[32] On the facts of Laverton Hale LJ found that on the basis of the evidence the defendant had acted in a way that was reasonable in keeping the visitor safe and that anything else was a "counsel of perfection imposing a near strict liability which the law does not at present do." I consider that I should bear this dictum in mind, particularly when deciding whether or not the defendant's actions were reasonable in all of the circumstances. I should also take care not to impose an unrealistic standard of care upon this defendant.

[33] Ms Simpson QC in argument made the following points which I summarise:

- (i) This was a particularly harsh period of weather. The defendant was doing its best in circumstances where the DRD information indicated that manpower was stretched across Northern Ireland.

- (ii) The defendant's intentions and motives were good in this case in that the gates were kept open for people to access the church thereby fulfilling an important social function.
- (iii) This was a church of modest size with limited manpower, and it cannot be expected to operate a sophisticated system of risk assessments.
- (iv) In this case the plaintiff is not an employee and so formal risk assessments are not required as in the McErlean case.
- (v) The defendant's staff were trying to clear snow from the steps and concentrated on that area which they considered to be the most dangerous area. That was reasonable in all the circumstances of the case.
- (vi) The defendant did put salt on the paving stones the night before.
- (vii) There was no evidence of claims notwithstanding the fact that there had been Mass in the morning and considerable footfall to this church.
- (viii) Ms Simpson QC also pointed to the only real conflict in evidence which was whether or not there was snow or ice at the pedestrian gates. The defendant's evidence was that there was snow present but the plaintiff and her witness described the underfoot conditions as icy.

[34] On behalf of the plaintiff Mr Mooney QC made various submissions. He said that the incident was clearly foreseeable. He also said that it was preventable. He referred to the fact that there was no system of inspection in the morning and that Mr Toner had left at 4.00 pm and that was it. He said there was no safe passage to the church, no warning signs, and that it was sheer luck that no one else had slipped and injured themselves as the plaintiff did.

[35] Having listened carefully to the evidence in this case and having considered the submissions of counsel I find that on the balance of probabilities, that the defendant is liable for the following reasons:

- (i) In my view the risk was clearly foreseeable. This was an extreme period of weather. The incident did not occur at the start of the period of bad weather. So the defendant knew about the bad weather conditions and in my view had the ability to take precautions to protect visitors to their premises.
- (ii) By admission of the defendant the systems in place at the defendant's premises were ad hoc. I do not consider that an organisation such as

this needs a sophisticated risk assessment process in place, but it does need to consider how to keep visitors reasonably safe on a basic level.

- (iii) In this case the premises were clearly open to the public and it seems reasonable that the public would use the pedestrian gate to access the church. There was no evidence that a clear path was laid for visitors to access the church.
- (iv) I have considered the issue of the underground surface as a point was raised about the limestone slabs. The defendant's witness Ms Caherty accepted that the slabs were replaced partly because they posed a particular risk when wet. In my view this would have heightened the risk in wet weather including in icy and snowy conditions. This factor was within the contemplation of the defendant and it is something that I take into account.
- (v) There was a difference in evidence as to the exact surface conditions at the accident locus. I do accept that there was an accumulation of snow in the grounds of the church. However this does not preclude the occurrence of ice and I prefer the evidence of the plaintiff and Mrs Donnelly that she fell as a result of ice.
- (vi) The defendant accepted that there was no inspection or treatment of the area where pedestrians would enter after 4.00 pm on the day before. It was also accepted that grit was not used. I do accept that a salting procedure took place however the evidence of Mr Toner was imprecise in relation to the mechanics of this. As such it is difficult to make an accurate assessment as to the effectiveness of the procedure. In any event, I do not consider that the defendant can simply rely on the salting that took place the day before the incident to establish that the premises were reasonably safe.
- (vii) In such bad weather, after a night of extremely low temperatures, I consider that it is reasonable to expect the occupier to check the pedestrian entrance for a hazard in the morning and if dangerous to take the necessary actions. As such I consider that this incident was preventable by measures such as warning signs, closing a gate, directing pedestrians to a safe path, creating one dedicated path, salting/gritting the dangerous area. I do not consider this to be an unrealistic standard of care to impose upon the defendant.
- (viii) I also consider that the evidence of Mrs Donnelly is particularly compelling. She is the archetypal Good Samaritan. She did not know the plaintiff but crucially she says that she found the conditions inside the pedestrian gate extremely slippery.

- (ix) I do not consider that a simple inspection in the morning at the gate was beyond the manpower of the defendant. I also do not consider that it was beyond the defendant's resources to have treated this area in the morning. I understand that the defendant was concentrating on the steps of the church in terms of clearance however in my view that left open the issue of pedestrians slipping and falling before they would even get to those steps. As such I do not think that the argument about concentrating on the steps is a sufficient defence to the case raised by the plaintiff.
- (x) The evidence of the defendant was that there was another option of using Mr Gribben to assist Mr Toner if he was under pressure in undertaking the work. This was not actioned by the defendant.
- (xi) It is significant in my view that Mr McKenna said that he thought that most people walked through the car entrance and not the pedestrian entrances. The defendant argued that vehicular traffic would break up the snow and provide traction. The concession by Mr Mc Kenna may go some way to explaining why the entrance at the pedestrian gate was left in so hazardous a state.
- (xii) I do take into account the evidence that no other claims had been recorded. I accept that is a consideration in the balancing exercise because on one view it may point to an effective system. However given the evidence in this case, particularly the evidence that there was no inspection on the morning of 7 December, I consider that it was simply fortunate that no one did slip and fall as the plaintiff did. In this regard as I have said I have also taken into account the evidence of Mrs Donnelly who corroborates the plaintiff in terms of the conditions under foot.
- (xiii) I consider that the witnesses for the defendant collectively made a different case to that pleaded in the defence. The defendant witnesses did not mention grit at all in their evidence. The significance of grit is that it provides traction. The witnesses referred to salt and it appears that grit was only ordered in 2011 after the accident. Also there was no evidence given and no case was made as to 5(b) of the defence that "the area where the grit had fallen formed a pathway, through which visitors should have entered the premises."

[36] In submissions Ms Simpson QC also raised the issue of contributory negligence. Having considered all of the facts of this case I cannot see how the plaintiff is to be faulted in any way for the injury sustained and so I reject any argument in relation to contributory negligence.

[37] These findings require a consideration of the appropriate level of damages in this case. There was a large measure of agreement between counsel in relation to this issue. Both counsel referred to the guidelines for the assessment of general damages in personal injury cases in Northern Ireland contained in "The Green Book". Counsel referred me to Section 7L dealing with knee injuries. Mr Mooney QC argued that this was a serious knee injury with on-going mobility issues on behalf of the plaintiff and loss of amenity.

[38] Ms Simpson QC accepted that this was a serious injury. However she pointed to the pre-existing difficulties that the plaintiff had and she also stressed that this was not a case where the medical evidence established osteoarthritis as a result of the incident. As such she said that this case fell within category (c) only but she accepted that it was at the higher end of category (c).

[39] I have considered the submissions in relation to the appropriate award of damages in this case. I have considered the various arguments made by reference to the "Green Book" however I bear in mind that these are guidelines. As in many cases, all of the aspects of the injury do not exactly replicate the guideline characteristics.

[40] I consider that this is a case involving a serious injury to the plaintiff's knee. There was dislocation and significant ligamentous damage. The plaintiff suffered immediate pain and discomfort and some loss of consciousness. She required hospital treatment and surgery followed by physiotherapy. She sustained scarring to her leg following surgery. The plaintiff required assistance from her family and adapted her living arrangements. The plaintiff has clearly suffered a loss of amenity. She has a limitation of movement which requires the use of a walking stick. I accept the plaintiff's evidence that she has suffered a loss of confidence.

[41] However, the medical evidence is also clear that the risk of degenerative change occurring in the long term cannot be related to this injury. I bear the particular circumstances of the plaintiff in mind. I have closely considered the plaintiff's pre-existing health and mobility issues which are not insignificant. In all of the circumstances I consider that an appropriate figure for the award of general damages is £60,000.