Neutral Citation No. [2013] NIQB 94

Ref: **GIL8972**

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

Delivered: **11/09/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

MARIAN McKEE

Plaintiff;

and

THE DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant.

GILLEN J

[1] The plaintiff, whose date of birth is 30 September 1954, claims damages for personal injuries alleged to have been sustained by her arising out of an accident in the early hours of 2 July 1999 when she alleges that she tripped over a defective flagstone.

[2] Without prejudice to the question of liability, counsel had agreed that the value of her injuries – namely a comminuted fracture of the left humerus into her joint – was £37,500.

[3] The defendant contested liability first on the basis that the plaintiff's evidence was unreliable and secondly that in any event it had discharged its legal duty under Article 8(1) of the Roads (Northern Ireland) Order 1993 ("1993 Order").

The Roads (Northern Ireland) Order 1993

[4] Articles 8(1) and 8(2) of the 1993 Order where relevant provide as follows:

> "(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 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 …"

Legal Principles Governing this Action

[5] The legal principles governing cases of this genre are well trammelled. Without embarking on a tour d'horizon of all the relevant cases, I have applied the following principles to the present case.

[6] First, Article 8 does not impose an absolute duty on the defendant. The question is whether the defendant has taken reasonable steps to maintain the surface in a reasonably safe condition having regard to the particular context and circumstances. The statutory adjective is "dangerous" and the court will normally look at matters such as:

- The frequency of inspections.
- The quality of inspections.
- The qualifications and credentials of the inspectors.
- The nature and purpose of the relevant surface.
- The intensity of vehicular and/or pedestrian user.
- The characteristics and usages of the area in question.
  (See McQuillan v Dept for Regional Development [2009] NIQB 36 at [12].)

[7] Secondly, the plaintiff must prove that the highway was in such a 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. That dangerous condition has to be created by failure to maintain or repair the highway and the injury or damage has to result from such a failure. The location of the highway, the particular part of the highway alleged to be dangerous and the user of the highway by pedestrians are all factors to which the court will have regard (see McArdle v Dept for Regional Development [2005] NIQB 13.)

[8] Thirdly, it must be the sort of danger which an authority may reasonably be expected to guard against. The liability is not to ensure a bowling green entirely free from all irregularities or changes in level. The question is whether a reasonable person would regard it as presenting a real source of danger. (See Mills v Barnsley Metropolitan Borough Council (Unreported) 7 February 1992).

[9] Fourthly, I respectfully share the views expressed by Girvan J in McClenaghan v Dept of the Environment (Unreported 28 February 1996) when he commented on the now long adopted 20mm criterion by the defendant as the relevant measure below which repairs are considered to unnecessary. Of this policy Girvan J said:

> "… The rigid and unthinking application of such a policy is open to serious criticism for a number of reasons. The primary statutory duty of the Department is to maintain roads and pavements to such a standard that users can reasonably safely use them and not be exposed to the real risk of physical injury. Defects of less than 20mm can be real sources of danger, depending on the circumstances including the location of the defect. An unthinking adherence to a 20mm policy makes no allowance for the differing conditions of individual roads and pavements. Thus in this case the proximity of the defect to the kerb made the hazard greater than might otherwise have been the case. Even if it was obvious to the inspector (as seems to have been the case here) that there is an obvious tripping hazard giving rise to a real risk of injury the policy dictates that it is not recorded as a defect at all and thus will not be repaired."

[10] This echoed the views expressed by Lawson LJ in Rider v Rider [1973] 1 QB 505 at 518 a-b when he said:

> "A stretch of uneven paving outside a factory probably could not be a danger for traffic but a similar stretch outside an old people's home that must be used by the inmates to the knowledge of the highway authority might be".

[11] Equally so I also bear in mind that the court can and should have regard to all relevant circumstances including economic and budgetary factors when considering the defence put forward by the Department under Article 8(2) in individual cases. Such economic factors are part of all the circumstances which must be taken into account (see Fraser v Dept of the Environment [1993] NIJB 22 at 39.) and matters of policy are an area where courts should tread cautiously.

[12] I simply add this to what Girvan J has already said. A policy which rigidly precludes the decision-maker on the ground from departing in any circumstances from the policy or from taking into account special circumstances relevant to a particular location and which thus precludes any degree of flexibility can often be disproportionate in its effect and may in certain circumstances even amount to an

unlawful policy. I recognise that a standard rigidly fixed with crafted precision does simplify the task of inspectors and ensures a consistency of approach to individual defects. Nonetheless to fulfil that desideratum the defendant needs to provide a chair for the prudent and conscientious maintenance officer who, relying on his experience and knowledge of a particular location sees an obvious tripping hazard giving rise to a real risk of injury notwithstanding the defect is less than 20mm. Law is characterised by dialectic, between theory and experience and between intuition and doctrine. Whilst policy necessarily must be located in the reality of tight budgets and strict economies, it must not be consumed by such matters if it endangers the public safety.

The Plaintiff's Case

[13] Mrs McKee and a consulting engineer Mr Hamilton gave evidence on behalf the plaintiff. Mr Bentley QC, who appeared on behalf of the plaintiff, through these witnesses and in cross-examination made the following points:

- On the evening of 2 July 1999 the plaintiff had been with her husband, who was a barman, in the Dunmurry Inn between 10.30pm and about 1.30am during which she had consumed, according to her own evidence, up to 4 scotch whiskeys.

- Having walked approximately 2-3 miles from the Inn towards her daughter's home, she was traversing River Road close to the school entrance of Dunmurry High School. This is the location of a bus terminus. She was crossing an island adjacent to the school comprising paving stones when she tripped and fell as a result of defects in the flagstones.

- I had before me photographs taken by her husband (who was unable to give evidence because of his medical condition) taken 2 days after the accident. With the benefit of a 50p piece, placed beside the alleged defects, it depicted an area of damaged flagstones on this island. The plaintiff had marked with an "X" on one of these photographs where she had allegedly tripped.

[14] Mr Hamilton, a consulting engineer with great experience in appearing before the courts, visited the area in 2001 but by that stage the island in question had been covered with tarmacadam and was no longer in the state that it had been in at the time of the accident. Viewing the photographs taken by the plaintiff's husband, Mr Hamilton estimated that the alleged tripping point marked with an X on one of the photographs was probably in the range of 12-15mm high and that the defective flagstone was raised 15-20mm or thereabouts adjacent to this. In his view it amounted to an actionable defect being very exposed. He relied on the fact that this island was close to a school where parents and children would be congregating/running and where he felt there should be a greater degree of care exercised by the defendant than normal. Whilst acknowledging that 8 week

inspections in this area were appropriate and that the defendant operated a 20mm cut off point for repair of defects, he considered that this area merited repair because of its location. In his opinion damage was caused to these flagstones by vehicles overriding the paved area.

The Defendant's Case

[15] The defendant called two witnesses namely Mr McClean the Management Foreman employed at that time by the defendant (then the Department of the Environment "DOE") and Mr McMahon currently a Section Engineer for the Lisburn area with the defendant.

[16] Mr Simpson QC, who appeared on behalf of the defendant, through these witnesses and in cross-examination made the following points:

- Excess alcohol had played a highly significant part in this accident. On the plaintiff's own admission she had taken 4 whiskeys on that evening. A medical report before me from Dr Rowley a Specialist Registrar contained the following entry:

> "I reviewed this lady today 6 March 2001. …This lady appears to be an Inadequate Impulsive Personality Disorder …. She continues to abuse alcohol on occasion yet has difficulty acknowledging that. She recently has been unable to perform her job as a hairdresser because her shoulder has been injured after she slipped on a pavement. She maintains that she had a few drinks taken at the time but denies that she had excess alcohol on board."

- The plaintiff denied that she had a drink problem at the time of the accident.

- I pause to observe that I did not regard this passing reference to "slipping" as relevant because experience has shown that medical practitioners can err in recognising the significance of precise terminology outside their field of expertise.

- Notwithstanding the plaintiff's adamant denial that there had been a streetlight/lamppost on the island where the accident happened, there was clear evidence from the defendant (accepted by Mr Hamilton) that not only had there been a lamp standard present on the island at the time of the accident but unchallenged records indicated that it was "not out" on the occasion of the accident. This directly contradicted the plaintiff's case that "because there was no light I could not see the state of the footpath".

- There was an 8 weekly inspection system by the defendant. Mr McMahon explained that where there is the greatest priority e.g. in the city centre, inspection is once per month, where there is medium priority e.g. on an urban footway the inspection is once every eight weeks (as in the instant case) and where there is low priority e.g. a housing estate inspection is every 16 weeks. Mr Hamilton accepted, as did I, that an 8 week inspection of the footpath in this area was appropriate.

- The 20mm criterion for repair was justified and rational in light of limited resources made available to the defendant. The aim is to manage the greatest potential risks to the public by getting to the most serious defects. Mr McClean was following the guidelines when, in assessing the defect in the relevant footpath as being under 20mm, he determined this was not an actionable defect and therefore did not merit repair. Mr McMahon asserted that there were no circumstances in which a defect under 20mms would be repaired.

- The subsequent alteration of this island from a flagstone area to a tarmacadam area had nothing to do with this accident. Adjustment to the kerb area of the island was to be undertaken at the same time as construction of a layby on the opposite side of the road in order to improve the ability of buses to turn in that area. Once the kerb on the island was adjusted, it was easy to remove the flagstones and to deploy bitmac. It was all part of the scheme for the construction of the layby in that area and had been due to start in June 1999 before the accident happened albeit that it did not occur until subsequent to the accident probably due to the fact that work should not be carried out during school holidays. In short the scheme had predated this accident.

- Mr McClean had carried out such inspections of defects since 1987 and was highly experienced in assessing the depth of defects. Hence the records of his inspections, which were before me on an 8 weekly basis around this period, did not record any defect in the area where the accident is alleged to have happened. He explained the various definitions contained in the records and despite a searching cross-examination by Mr Bentley on behalf of the plaintiff I find nothing untoward or unsatisfactory about the records he had made of defects in the River Road area. Having considered the photographs of the plaintiff's husband Mr McLean did not believe that there was any evidence of a defect over 20mm and hence he would not have recorded it as an actionable defect.

Conclusions

[17] I have come to the conclusion that I must dismiss the plaintiff's claim for two main reasons.

[18] First, the onus of proof is on the plaintiff to satisfy me her accident occurred in the circumstances which she has alleged. I am not persuaded that she has given me an accurate account of how she sustained her injury. I watched her carefully as she was cross-examined by Mr Simpson on the issue of her drinking on that night. When questioned about the contents of Dr Rowley's report and the suggestion that she had a drink problem at this time I found her denials of such a suggestion to be unimpressive and unconvincing. Her demeanour at this stage of her cross-examination betrayed an evasive and uncertain element which convinced me that her assertion of 4 whiskeys on that evening probably did not reveal the full story of alcohol consumption immediately prior to her accident. My belief was fuelled by her stout assertion that there was no street lighting at this island notwithstanding the clear evidence that she was in error in so asserting. I did not understand why it was that she was able to assert that she could not see the state of the footpath because there was no light when self-evidently the area of the island had been illuminated by a lamppost and the state of the footpath must have been obvious to her. Whilst the inordinate and unexplained delay in the processing of this action (the Writ of Summons was issued on 5 June 2002 and the Statement of Claim was served on 18 June 2003) will not have served her memory well, nonetheless the combination of her consumption of alcohol and failure to recollect any lighting fatally flawed the reliability and credibility of the narrative that she put before me.

[19] Secondly, even had I accepted on the balance of probabilities that the version of events that she gave as to the circumstances of her trip had been accurate, I am satisfied that the defendant had discharged such legal duty as was owed to her and has successfully invoked the so-called "statutory" defence under Article 8(2) of the 1993 Order. The combination of Mr McClean's assessment of this area, based on many years experience of assessing 20mm defects and the evidence of Mr Hamilton as to the size of the defect where the accident actually happened, all persuade me that the defect relied on by the plaintiff at the precise location where she allegedly tripped was under 20mm and probably in the range of 12-15mm.

[20] As I have already outlined in some detail earlier in this judgment I am satisfied that there are circumstances where the defendant must be prepared to be flexible in imposing the 20mm criterion for repair of a defect. However, I do not believe that this area falls into such a category. As the helpful photographs and sketch of the area before me illustrated, this small island where the accident occurred, albeit adjacent to the school, is not exactly at the entrance. There was no evidence of any recorded previous accident or trip prior to the plaintiff's injury. The area was adequately illuminated with a lamppost immediately adjacent. The nature and purpose of this island of flagstones and the likely intensity of usage at this particular area (not immediately outside the school) in what is clearly not in character a city centre type location convinced me that there was no reason to justify

a move from the 20mm criterion for actionable defect. Therefore this did not present as an obvious tripping hazard giving rise to a real risk of injury. It seems to me therefore that this is a classic case of an instance where, given the budgetary constraints, a court should be slow to question the implementation of such a policy. In all the circumstances there I am satisfied that the defendant has made out the statutory defence in this instance.

[20] I therefore dismiss the plaintiff's case.