Neutral Citation No. [2005] NIQB 13 | *Ref:* **HIGF5188**

Judgment: approved by the Court for handing down | *Delivered:* **04/03/2005**

(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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SARAH MCARDLE

-v-

DEPARTMENT OF REGIONAL DEVELOPMENT

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HIGGINS J

[1] The plaintiff was born 2 February 1926 and is now 78 years of age. She resides at Mountview Park, Banbridge. On 17 July 2001 when she was 75 years of age she was walking along a pathway behind Mountview Park when she tripped on the exposed edge of a broken flagstone.

[2] She was taken to hospital where it was discovered she had sustained a comminuted fracture and subluxation of her right shoulder, which involved a three part impacted fracture of the right neck of the humerus. She was detained in hospital and treated conservatively. The function of her right shoulder is now moderately impaired so that some household tasks are difficult or impossible for her and she requires assistance with dressing and bathing and suchlike. Social Services provide some assistance during the daytime, while her son who lives with her looks after her in the evening. Prior to this accident she was a very fit and active person for her age and her son says this injury has had a devastating effect on her quality of life.

[3] The plaintiff lives in an area that was once on the boundary of Banbridge. It is a reasonable distance from the town centre but within walking distance. The housing in the area is mixed with about 12 dwellings reserved for elderly residents, though there are probably more in the other nearby housing. The pathway on which the plaintiff fell is a flagstone walkway across the rear of the row of houses in which she lives. It provides access for those residents from the rear of their dwellings to a main road. There is also access from the front of the dwellings. The pathway was

probably constructed in the mid 1970s at the same time as the surrounding Housing Executive houses. The usage of the pathway could be described as casual and not frequent but it does provide access to the only nearby shop. The plaintiff was returning from this shop when she fell.

[4] The plaintiff's son was in Gran Canaria at the time of the accident. On his return he went with the plaintiff to the scene and photographed the location. The exposed edge has been caused by cracks in the flagstone with the flagstone sinking in the middle. This has been associated with the installation of what was referred to as a "toby" in the centre of the flagstone or with works carried out to it. The plaintiff's son placed a box of matches against the raised edge and this can be seen in the photographs. He was convinced that the match box was the larger of the two produced in court. However the photographs do not bear that out and I think the plaintiff's son is mistaken in his recollection and in his evidence. The matchbox shown in the photographs is the one with the red logo and the photograph of the Giant's Causeway. This box has a depth of 15 mm. The other matchbox has a depth of 20mm. One of the photographs, taken from behind the exposed edge with the matchbox in position, shows a raised edge of the matchbox above the flagstone. This indicates that the depth of the exposed edge of the flagstone is less than 15mm. It was mooted that this was an optical illusion caused by the height at which the photograph was taken, but I do not think that suggestion can be sustained. While a small allowance may be made for the height at which the photograph was taken, the photographer was sufficiently far back to enable any exposed edge of the matchbox to be seen. I preferred the evidence of Mr Beattie the Department's Section Engineer on this issue. Indeed the exposed edge of the matchbox is clearly visible in the photographs.

[5] A site inspection took place on 11 September 2001. Mr A Scoley, a Department Supervisor, measured the raised edge as 12 mm. That measurement accurately records the height of the exposed edge of the flagstone and is consistent with the matchbox not being flush with the adjacent flagstone as shown in the photographs. Not all the edge of the flagstone is exposed. A portion of the right hand side of the broken piece of flagstone is exposed and then it tapers until it is level or almost level with the surroundings. The exposed area is no more than several inches.

[6] This area is inspected every two months by Inspectors on behalf the Department. They are instructed to report trips of 20mm or more. This standard was set some years ago and has been the accepted yardstick in this jurisdiction for inspectors of the public highway. In the majority of cases this benchmark is sufficient to determine whether there exists an actionable defect or not. However whether a particular defect is above or below a certain height like 20mm, is not the issue in the determination of whether the Department is in breach of their duty to maintain the highway.

[7] Frequency of inspection varies from area to area throughout Northern Ireland depending on usage. Monthly inspections are the norm in urban areas like Belfast City centre or Bainbridge town centre where there is considerable traffic. At no inspection either before or since has this pathway been noted as an area requiring remedial attention. There have been no complaints about this pathway or this particular flagstone nor have there been any actions in respect of it nor are any pending.

Article 8 of the Roads (NI) Order 1993 provides -

> "(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.
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> (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 –
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> (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."
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> (3) For the purposes of a defence under paragraph (2)(a) the court shall in particular have regard to the following matters:-
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> (a) the character of the road, and the traffic which was reasonably expected to use it;
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> (b) the standard of maintenance appropriate for a road of that character and used by such traffic;
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> (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, that warning notices of its condition had been displayed."

[8] It is well settled law that in any action against the highway authority for compensation for failure to maintain the highway, the plaintiff must prove that –

a) 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;
b) the dangerous condition was created by the failure to maintain or repair the highway;
c) the injury or damage resulted from such a failure.

[9] Where these facts are proved the Department may nonetheless rely on the statutory defence set out in Article 8 (2), supra, namely that it had taken such care as the circumstances reasonably required, to secure that the highway was not dangerous for pedestrians. In determining whether or not these facts are proved the court must have regard to the particular highway in question, its location, the particular part of the highway alleged to be dangerous and the user of the highway by pedestrians. A little used pathway is not to be regarded in the same way as a busy city centre pedestrian route. Furthermore it does not follow that, because a pedestrian fell due to a raised edge on a pavement and sustained serious injury, that the pavement and the particular part of the pavement are dangerous to traffic. The test to be applied is reasonable foresight of harm to users of the pavement – see Steyn LJ in Mills v Barnsley Metropolitan Council (unreported 7 February 1992). Steyn LJ also observed that it is reasonably foreseeable that any defect in the highway, however slight, may cause an injury to a pedestrian. But that is not the test as to the meaning of "dangerous" in the context of highways. The test is whether the highway (in this case the pavement or pathway) is no longer reasonably safe for those who might be expected to walk over it.

[10] Thus the first issue is whether the exposed edge of 12mm (a fraction under half an inch) in this pavement was dangerous. While a raised edge of 20mm or above may well be found to be dangerous, it does not follow that an edge of less than 20mm will be found to be not dangerous. It depends on the circumstances, the nature of the trip and the location and user of the pavement. This is a Housing Executive estate of mixed-aged residents. The majority of the housing is two storied and there are about twelve old people's homes. The majority of the users of the pathway would be the occupants of the houses that back onto it, though a higher percentage of older people might

use it, than would use other paths. Greater edges than this one, though less than 20mm,have been held not to be dangerous. In L (minor) v DOE 1996 10 BNIL 102 Carswell LJ held that a 17mm raised kerb in a housing estate was not of high enough risk to pedestrians to be a danger.

[11] Cases involving trips on the highway depend very much on their own facts. Taking into account the location of this pathway, its user and the nature and extent of the exposed edge, I do not think this part of the pavement was dangerous in the sense in which that word is used in relation to highways.

[12] If I had been persuaded that this exposed edge was a danger then I would have to consider whether the defendant could relay on the statutory defence. This area is inspected every two months. It seems to me that this is perfectly reasonable for the area and the amount of pedestrian traffic. The user by elderly persons like the plaintiff is a factor to be taken into consideration. However that group is only one of many different groups who would use the pathway. Others would include children, parents with children walking or in prams or in buggies as well as persons with disabilities.

[13] The main argument relating to the statutory defence centred on whether the defendant was acting reasonably in applying the 20 mm criteria for intervention, before taking remedial action. Mr Beattie gave evidence that to increase the criteria to 10mm would increase the defendant's costs in highway repair by a factor of four. The defendant has to balance the risk against the cost and find the best compromise. To do otherwise would be unrealistic. I am satisfied that the application of the 20mm criteria to this area of the public highway was a reasonable one. Taking those factors into account together with the inspection and maintenance programme, I am satisfied that the defendant has proved that the Department has, in all the circumstances, taken such care as was reasonably required to secure that the pathway was not dangerous for pedestrians. There will be judgment for the defendant.