Neutral Citation No: [2019] NIQB 37	*Ref:* **McA10931**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **22/1/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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LEAH SMITH

-v-

NATIONAL FARMERS UNION MUTUAL INSURANCE SOCIETY LIMITED
AND
ROBINSONS SERVICES LIMITED

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McALINDEN J

[1] The Plaintiff's date of birth is the 4 July 1983. She claims damages arising out of an accident which occurred on a public footpath at Alfred Street in Belfast at approximately 4.00 pm on Friday 22 March 2013.

[2] The letters of claim in this case are dated 17 June 2013 and 4 September 2014. The date of the Writ of Summons is 22 March 2016. A Statement of Claim was served on 9 May 2017 with an amendment thereto dated 17 January 2018.

[3] The undisputed facts in the case are that the Plaintiff at the relevant time was employed by the first named Defendant as a claims handler in Harvester House which has an address in Adelaide Street. It has a front entrance leading out on to Adelaide Street and a rear entrance leading down some 12 steps into a car park, with the car park then exiting on to Alfred Street.

[4] The facts established in this case are that on the afternoon in question when the Plaintiff was leaving her place of work she came down from the sixth floor using the stairs as the lifts were out of action at that particular time. She exited the rear exit of Harvester House, descended the steps, crossed the car park, exited the car park through the gate, turned right on Alfred Street and as she walked up Alfred Street in the vicinity of a concrete manhole cover in the footpath she slipped and fell landing on her left lower leg and sustaining a significant fracture of the lateral malleolus. At the time of the accident she was wearing DM boots.

[5] The cause of her accident was the presence of compacted snow on the footpath in Alfred Street. She described the surface as being white or grey compacted snow and that her steps did not make any impression on the compacted snow. She describes the footpath as being very slippery.

[6] As a result of this accident she sustained a fracture of the lateral malleolus. She was required to attend the Ulster Hospital, Dundonald. Initial attempts were made at closed manipulation of the fracture. These attempts were unsuccessful and the Plaintiff subsequently underwent open reduction and internal fixation with the insertion of a plate and screws in her right ankle. Her ankle was then immobilised in a plaster cast for between 6 to 8 weeks and upon the removal of the cast it was observed that there was a superficial wound infection to the proximal part of the wound on the lateral side of the ankle and this required treatment by way of oral antibiotic therapy and dressing for a number of weeks. The Plaintiff's persisting symptomology is of intermittent stiffness and discomfort in her ankle. She also complains of scarring on the lateral side of the ankle which causes her at times to wear trousers or tights which will in some way camouflage the scarring on the lateral aspect of the ankle.

[7] She was a keen runner before her accident and she has thankfully been able to regain her sporting activities. It took about 18 months for her to be able to get to a level of fitness that she had previously enjoyed prior to her accident. She is able to maintain that level of fitness at this stage, experiencing occasional twinges of pain in her ankle. In summary, what was a fairly serious fracture has, by means of the Plaintiff's own efforts as such, achieved a reasonably satisfactory outcome. But the court has had the opportunity to observe at close quarters the nature and extent of the scarring on the lateral aspect of the ankle and for a young woman it is quite clear that such scarring would be considerably annoying and distressing.

[8] There are the established and agreed facts of the circumstances of the Plaintiff's accident.

[9] I now wish to deal in more detail with the various accounts as to how the Plaintiff happened to injure herself on the day in question. The Plaintiff's case is that she entered the premises via the Adelaide Street entrance as was her usual routine having taken a bus to work. The condition of Adelaide Street on the morning in question she states was slushy and she specifically gave evidence that her DM boots were wet when she got into work and that was her clear recollection.

[10] She also remembers that she was able to leave the premises via Adelaide Street at lunchtime and at that particular time there was no difficulty leaving the premises, although the lifts were out of action. At that stage the shutters were not down.

[11] In the afternoon when it came for her to leave she came down again using the stairs and noticed that the shutters were down at the Adelaide Street exit of the

premises and as a result she spoke to a security guard, who was not the usual security guard, and asked the security guard to raise the shutters so that she could leave via the Adelaide Street exit. The security guard refused to raise the shutters and she explained to the security guard that she had at lunchtime seen people on Alfred Street slipping and that Alfred Street was in a hazardous condition and that she wanted to leave through the Adelaide Street exit, but her evidence is that the security guard simply informed her that she had to leave through the rear exit of the premises.

[12] The Plaintiff's evidence is that she did so and in crossing the car park she did not consider that there was any evidence that the car park had been gritted and she was able to cross the car park because she kept within the track made by a car tyre and as a result she was able to safely negotiate her way across the car park until she reached the car park gates and she turned right on to the footpath on Alfred Street and it was at stage that her accident happened. She then states in her evidence that she was helped to her feet by two males who were wearing suits. They basically linked her, one each side, and helped her walk or hobble back into the car park and they helped her in through the rear entrance of Harvester House and it was at that stage that she asked for members of staff to attend and a lady, Ms Tennyson, attended and she informed Ms Tennyson as to the circumstances of her accident.

[13] The Plaintiff's evidence was that an ambulance was called, but another employee Mr Fenton offered to take the Plaintiff to hospital. He indicated to her that he lived in the vicinity of the Ulster Hospital and he could take her there. As a result of that conversation, Mr Fenton went round to retrieve his car, and then drove his car round to the Adelaide Street entrance and the Plaintiff was helped from the premises through the Adelaide Street entrance into Mr Fenton's car to be taken to hospital. She is quite clear in her mind that the shutters at this stage were up and in fact the shutters were put up before there was any reference to an ambulance being called.

[14] So the Plaintiff's case is a fact specific argument which is based on her report of hazardous conditions on the footpath on Alfred Street to a security guard who was charged with security duties and also maintenance duties in the premises. It is her case that having reported the hazardous condition immediately outside the premises and having requested the security guard to enable her to leave via the Adelaide Street exit which in her view would have been the safer option, she was refused this opportunity and was required to negotiate her way across a hazardous public footpath which resulted in her slipping and falling and sustaining a significant injury to her right ankle.

[15] Insofar as the Plaintiff alleges that she had a conversation with the security guard before she exited the premises, the security guard in question, Mr McMillen, in giving his evidence, stated that he could not recall any such conversation taking place. He also stated that if any such conversation had taken place he would have had no hesitation in raising the shutters to enable the Plaintiff to leave through the

Adelaide Street exit. One of the reasons given by Mr McMillen to explain why he was able to state that he would have had no hesitation in doing so is that when requested by others to open the shutters to enable them to exit the premises on to Adelaide Street he complied with those requests. In relation to the decision to lower the shutters on the day in question, it is clear that there was an issue with the electricity supply to the building during this period. The electricity supply had been intermittent and as a result of this, the lifts had gone out of action. The lift repair company had been called to the premises earlier that morning, had restored the function of the lifts but then a subsequent power cut had occurred and the lifts had gone out of action again and remained out of the action for the duration of the day. Mr McMillen in his evidence stated that because the electricity supply controlled both the operation of the shutters and the operation of the magnetic locks on the doors at the front and rear entrance he was of the view that if the power failed there would be no means of controlling access to the premises from Adelaide Street. In those circumstances, he felt it appropriate to contact Mr McAleenan who was a manager employed by the first named defendant to discuss what should happen to the doors and shutters, having regard to the intermittent power supply.

[16] Mr McMillen was a temporary replacement for the usual security guard who worked in this building and so I think it is fair for the Court to conclude that he would not have taken a decision in relation to the shutting of the shutters at the front door without seeking at least input, if not instruction, from the service manager of the first named Defendant. The court concludes that a conversation did take place between Mr McAleenan and Mr McMillen and the court concludes that, with some significant input from Mr McAleenan, a decision was taken to lower the shutters to render the premises more secure in the event of a power failure and that decision had significant input from a servant or agent of the first named Defendant.

[17] The crucial aspect of this case as far as the Court is concerned is whether the Plaintiff had a conversation with Mr McMillen prior to leaving the premises on the day in question. The Court readily accepts the proposition of law put forward by both Defendants that an employer is ordinarily not responsible for the condition of the public highway outside the area where the employee is directly employed. The Court accepts that proposition as a well-founded proposition in law. The argument that is put forward by the Plaintiff in this particular case is not that the Defendants had a direct responsibility to maintain the public footpath or public highway outside the curtilage of the premises where the Plaintiff was employed. The case being made by the Plaintiff in this particular action is that by reason of the actions of Mr McMillen as the security guard employed by the second named Defendant the Plaintiff was required to exit the premises via an exit which exposed her to an increased risk of injury, an increased risk of which Mr McMillen was specifically made aware. So the outcome of this case in the Court's view depends upon whether it is established as a fact that the Plaintiff did have a conversation with Mr McMillen in the terms that she alleges in her evidence i.e. that she wished to leave the premises via the Adelaide Street exit, that she had seen others slipping in the Alfred Street

footpath and that despite that information Mr McMillen had refused to raise the shutter and had directed her to exit via the rear exit.

[18] Having carefully considered the content of both parties' oral evidence and having carefully considered all the supporting documentation that has been presented in this case, the Court concludes and it concludes readily that it can place considerable reliance upon the evidence given by the Plaintiff in this case and the Court reaches this conclusion for the following reasons. In the letters of claim which were written on 17 June 2013 and 4 September 2014 the Plaintiff's case is clearly stated and set out to the effect that a servant or agent of the Defendants was informed as to the hazardous condition of Alfred Street and of the Plaintiff's wish to exit the building through the Adelaide Street entrance. Mr McMillen in his evidence states that he was first requested to consider the matter of whether there was any conversation between him and the Plaintiff on 22 March 2013 in relation to the matters which have been the subject of this action only three weeks ago. The Court considers that it would be very unusual for someone to be able to recall the contents of a conversation or whether a conversation took place six years ago when that issue had not been raised at any stage prior to some three weeks earlier before giving evidence. So in the circumstances, the Court concludes that the more credible, the more reliable evidence in this case, is the evidence given by the Plaintiff on that crucial issue of whether a conversation took place and if a conversation took place what the content of that conversation was. Having made that factual finding, the Court is compelled to find for the Plaintiff in this action. It is quite clear that the employee of the second named Defendant was put on notice of a hazardous condition which existed immediately outside the curtilage of the premises in which the Plaintiff was employed. That servant or agent of the second named Defendant was specifically requested to take a step which he states would have been a very straightforward step namely the raising of a shutter to enable the Plaintiff to exist via another entrance which would have enabled her to avoid the hazard the existence of which she had informed the servant or agent of the second named Defendant.

[19] In the circumstances this clearly imposes a duty upon the servant or agent of the second named Defendant to have due regard to the concerns expressed by the Plaintiff and to have due regard to her request to be allowed to leave the premises by the safer route. The failure to have any regard for the complaints made by the Plaintiff in this case and the failure to raise the shutter to enable the Plaintiff to exit via the Adelaide Street route is in the view of the Court a clear breach of the duty owed by the servant or agent of the second named Defendant to the Plaintiff. In those circumstances the Court concludes that liability rests with the second named Defendant for the injury suffered by the Plaintiff in this case.

[20] The next question which the court has to answer is whether any liability attaches to the first named Defendant in relation to the circumstances of the Plaintiff's accident. The legal nexus between the first named Defendant and the second named Defendant seems to be somewhat complicated in that the National Farmers Union Mutual Insurance Society Limited is both the owner of the building

and a tenant of the building having a tenancy of one or two of the upper floors of the building. A property management company BTW Shiels seems to have been employed or engaged by the National Farmers Union to service the building as such and Robinson Services Limited appears to be a company employed by BTW Shiels to provide security and some limited maintenance services in respect of the building in question. Despite the complexities of the legal relationship between Robinson Services Limited and the National Farmers Union Mutual Insurance Society Limited, what is clear is that the National Farmers Union Mutual Insurance Society Limited owes a non-delegable duty of care to its employees to ensure that they are reasonably safe during their employment with the first named Defendant. In the circumstances of this particular case, having regard to the input which Mr McAleenan, the service manager of the first named Defendant had in relation to the decision to close the shutters on the day in question, the Court is of the view and finds that the National Farmers Union Mutual Insurance Society Limited is jointly and severally liable to the Plaintiff on the basis of breach of a non-delegable duty of care to the Plaintiff. So in the circumstances the Court finds on a joint and several basis against both Defendants in this action.

[21] Turning then to the question of damages in this case. The Plaintiff sustained a nasty closed fracture of the right lateral malleolus. There was some evidence of talar shift. A closed reduction was attempted but this did not achieve satisfactory stability of the fracture and as a result a decision was taken to perform open reduction and internal fixation after the initial gross swelling had subsided. Surgery was performed and a plate and a number of screws were inserted and the leg was immobilised in a plaster cast. To the Plaintiff's credit, she returned to work with her cast in place and remained at work thereafter. This was despite the fact that following removal of the plaster cast it was noted that there was a superficial wound infection which required treatment by way of dressing and antibiotic therapy for a number of weeks.

[22] I have outlined the long-term sequelae of the nature of the injury earlier in my judgment. Having regard to the submissions made on behalf the Plaintiff in relation to the appropriate value to be placed on this case, having considered the various categories in the Green Book and having regard to my own viewing of the scarring with which the Plaintiff is permanently fixed, I am of the view that the appropriate level of damages in this case is the sum of £35,000 and I award that sum with 2% interest on general damages from the date of issue of the writ. I also award the Plaintiff High Court costs and I order taxation of those costs in default of agreement.