Neutral Citation No: [2017] NIQB 58	*Ref:* McB10329
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 16/06/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN

DUANE ANDERSON

Plaintiff

and

DEPARTMENT OF REGIONAL DEVELOPMENT

Defendant

_____

McBRIDE J

Introduction

[1] The plaintiff claims that he sustained personal injuries arising out of an injury sustained when he fell as a result of a defect in the pavement at or about East Bridge Street, Belfast on 4 January 2010.

[2] The plaintiff was represented by Mr McCollum QC and Mr Ciaran McCollum of counsel. The defendant was represented by Mr Aldworth QC.

[3] As the circumstances of the accident are seriously in dispute it is necessary to set out in some detail the evidence of the parties and how that evidence was tested in cross-examination.

Evidence of the Plaintiff

[4] The plaintiff who was born on 21 May 1982 gave evidence that on 4 January 2010 he left his work at GEM Technologies at approximately midday. As he walked citywards along East Bridge Street, in the vicinity of the back of St George's Market, his foot caught on a broken flagstone and he fell forward. He put his hands out and went over on his right hand as he hit the ground. He got to his feet quickly and as a

result of feeling embarrassed, due to the presence of other people in the vicinity, he immediately walked home.

[5] A few days after the accident the plaintiff took photographs of the locus of his fall and he indicated to the court that he had fallen on a flagstone which had a corner missing. The defect was measured as being 15mm deep and 40mm wide at its widest point.

[6] When the plaintiff reached home on 4 January 2010 he stated that he felt pain in his hand and was unable to use it. He took some painkillers and went to bed. He had disturbed sleep due to ongoing pain and had to elevate his hand as it was very painful when touched.

[7] The next morning the plaintiff noted that when he went to brush his teeth he was unable to grip the toothbrush because of pain in his hand. Notwithstanding this the plaintiff proceeded to go to work. He indicated he had some difficulty using his right hand due to pain and had to use his left hand to perform some of his tasks at work. At some point during the day the plaintiff got up from his desk and as he walked along he stumbled. He proceeded to put out his hand to stop the fall. He demonstrated to the court how he gripped or grabbed the corner of a desk with his right hand to stop him falling. The plaintiff immediately noticed there was pain in his hand, that it was swollen, bruised and throbbing. Due to the pain and his inability to carry on with his work he went home early and took painkillers.

[8] Later, due to the prompting of his partner, he attended the Royal Victoria Hospital where he was x-rayed. The x-ray revealed a fracture of the base of the 5th metacarpal. This was treated with a reduction and percutaneous wire fixation. His hand remained in strapping for several weeks and initially his hand was stiff, sore and grip was weakened. At the present time he continues to complain of intermittent pain especially in cold weather and when he uses his hand for prolonged periods of time, for example, writing or power washing.

[9] Under cross-examination Mr Aldworth QC put to the plaintiff that he had not sustained his injury as alleged and pointed to a number of inconsistencies which he submitted demonstrated the plaintiff was not a credible witness. In particular Mr Aldworth QC referred to inconsistencies between the plaintiff's evidence to the court and what he had said:

(a) To hospital staff at accident and emergency.

(b) To Mr Elliott at review.

(c) To Mr Kealy.

(d) In the Claim Form.

(e) To the engineer at the site inspection.

[10] In addition Mr Aldworth QC sought to demonstrate that the evidence of the plaintiff was not credible given the delay in seeking medical attention and the lack of objective evidence to show that the plaintiff fell as alleged.

[11] When the plaintiff attended the Royal Victoria Hospital on 5 January 2010 the accident and emergency notes state that his reason for attendance was "injury at work". The triage notes state "right hand injury today at 12 MD approximately". The clinician further notes "patient states he fell against table at work today at approximately 12 MD – injured right hand/wrist (hit palm off corner of table)" and no abrasions were noted.

[12] When cross-examined on these matters the plaintiff explained he informed hospital personnel that he had fallen at work as he was simply telling them what had happened to him that day. He accepted that he did not tell any hospital personnel that he had fallen on the pavement the previous day.

[13] At a review on 9 February 2010 Mr Elliott noted as follows:

> "He would like me to state that he thinks he injured his hand whilst walking to work when he fell and landed on a kerb and not as stated in his A&E notes that the injury occurred at work."

[14] It was put to the plaintiff that as a letter of claim had been sent out on 8 February 2010 he had already attended with a solicitor and he was therefore asking Mr Elliott to now change the notes as he knew the original A&E notes were problematic for his claim. The plaintiff stated that he was only seeking to correct the doctor's misunderstanding that the injury had occurred at work when in fact it had been caused by his fall on the pavement.

[15] Mr Kealey, Consultant Orthopaedic Surgeon, in his report dated 10 January 2013 records under "History":

> "The plaintiff stated he tripped over a broken flagstone causing him to overbalance and fall forward … his pain increased overnight and he attempted to return to work the next day but was unable to do so and attended RVH."

[16] When cross-examined about why he had not informed Mr Kealey about the fall at work the plaintiff said that he thought he had but he was unable to remember. He also stated that he did attempt to work on 5 January 2010 but was unable to do so. For this reason he left work early and returned home.

[17] The plaintiff filled in a Personal Injury Compensation Form ("Claim Form") which was sent to him on 2 March 2010. Question 6 asked "Where did the accident happen?" In response the plaintiff stated, in his own handwriting, "On the road on way towards Central Station outside St George's Market". In response to Question 7 which asked "In what direction were you travelling at the time?", he responded: "From city centre to Lanyon Place (GEM)".

[18] The plaintiff accepted that his responses in the Claim Form indicated that he was travelling in the opposite direction to the one he had described in evidence to the court. He explained this inconsistency on the basis that he did not read the questions correctly.

[19] The plaintiff attended a site inspection on 19 April 2010. He accepted that he had indicated a locus which was different to the one he indicated to the court as the location of his fall. He stated that when he attended the site inspection the defendant's engineer had suggested to him the place where the accident had occurred, saying "Is this the flag?" He simply agreed to this suggestion. He now accepts that this was an error on his part and in fact he fell at a locus which was some 45 yards away.

[20] When questioned about the stumble at work, the plaintiff was unable to give any explanation for the cause of his stumble. He was clear however that this stumble was of no consequence and that the cause of his injury was the fall on the pavement the previous day.

[21] In respect of the delay in seeking treatment the plaintiff stated that he only sought treatment because his partner urged him to do so and indicated he had even delayed seeking treatment on the day following the accident.

Evidence for the Defendant

[22] The defendant called two witnesses, Mr Gormley and Mr McClay. Mr McGormley, an employee of the defendant, gave evidence that he attended the site inspection on 19 April 2010. He confirmed that the plaintiff had identified a different locus to the one he had identified in court as the location of his fall. He further accepted in cross-examination that the two loci were situated some 45 yards apart and that the defects in question were similar in nature as each consisted of a broken corner to a flagstone and each defect was situate in the centre of the pavement.

[23] Mr Gorman strenuously denied that he had ever suggested the locus of the accident to the plaintiff and stated that the plaintiff had volunteered the locus to him.

[24] Mr Gormley further gave evidence about the highway inspections which he had carried out in this area. He indicated that inspections were carried out on a

monthly basis and in particular inspections were carried out on 22 November 2009, 20 December 2009 and 20 January 2010. No defect was noted in the area in the November of December inspection. In January a defect was noted which involved a 21mm defect and a loose rocking flag which was given a priority repair of R2. This meant repairs were to be completed within 5 working days. The repair was completed on 27 January 2010. At the site inspection the plaintiff identified the locus of the accident as being the flagstone which had been the subject of repair. Mr Gormley indicated that this defect had been noted as it was in excess of 20mm. He further stated that the actual locus which the plaintiff now relied on was not recorded in the records as it was under 20mm in depth.

[25] Under cross-examination Mr Gormley accepted the R2 priority was given to the defect as this area had high pedestrian traffic. He further accepted that if a defect was under 20mm it would never be recorded. He did accept that the defect where the plaintiff fell could possibly catch a pedestrian's foot.

[26] Mr McClay, Section Engineer, gave evidence about the Department's maintenance policy and explained it was based on ensuring effective use of resources. Based on the policy the Department instructed its inspectors only to note defects which were 20mm or more in depth. He confirmed that defects less than this were not recorded.

[27] Mr McCollum put to Mr McClay that there was an unthinking rigid adherence to a policy and when asked whether he felt the defect which had an overhanging ledge was dangerous to pedestrian traffic Mr McClay stated that the photographs were unclear and therefore he was not in a position to answer this question.

Legal Framework

[28] The relevant principles to be applied in determining whether a Roads Authority is liable for a defect on a pavement causing an injury are now well rehearsed. They are succinctly distilled by Girvan J in McClenaghan v DOE for Northern Ireland [unreported, 28th February 1996] at pages 3-5.

[29] The Department owes a statutory duty to maintain roads under Article 8 of the Roads (Northern Ireland) Order 1980. When a plaintiff alleges breach of this statutory duty the plaintiff must establish:

(i) that he sustained injury as a result of the alleged defect;

(ii) the road was in a dangerous condition due to failure to maintain and repair; and

(iii) the Department, in all the circumstances, did not do what was reasonably required to ensure that the road was not dangerous for traffic having regard, in particular, but not exclusively to matters set out in Article 8(3).

[30] The question whether a road is dangerous is a question of fact and in determining this matter the court takes into account the nature of the defect, the size of the defect, the location of the defect, the amount of traffic on the roadway, and the actual position of the defect on the roadway or pavement together with any other circumstances which may be relevant to determination of whether the defect in question presents a danger to the public.

Consideration

[31] Two questions arise in this case:

(a) Has the plaintiff established that he sustained injury as a result of the alleged defect?

(b) Is the defect an actionable defect that is, was the footpath in a dangerous condition due to the defendant's failure to maintain and repair?

Plaintiff's Credibility

[32] In Thornton v NIHE [2010] NIQB 4 Gillen J at paragraphs 12 and 13 set out some principles for assessing credibility:

> "[12] Credibility of a witness embraces not only the concept of his truthfulness i.e. whether the evidence of the witness is to be believed but also the objective reliability of the witness i.e. his ability to observe or remember facts and events about which the witness is giving evidence.
>
> [13] In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following:
>
> - The inherent probability or improbability of representations of fact,
> - The inherent probability or improbability of representations of fact,
> - The presence of independent evidence tending to corroborate or undermine any given statement of fact,

- The presence of contemporaneous records,
- The demeanour of witnesses e.g. does he equivocate in cross examination,
- The frailty of the population at large in accurately recollecting and describing events in the distant past,
- Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication,
- Does the witness have a motive for misleading the court,
- Weigh up one witness against another. "

[33] The defendant submitted that the plaintiff lacked credibility because of:

(a) Inconsistencies between his evidence to the court and what he said:

(i) To hospital staff at A&E,

(ii) To Mr Kealy,

(iii) To Mr Elliott at the review appointment on 9 February 2010,

(iv) At the site inspection in April 2010 and

(v) In the Claim Form.

(b) His delay is seeking medical treatment.

(c) Lack of objective evidence to support his claim.

(d) The manner in which he gave his evidence to the court.

[34] I have carefully considered the hospital notes and records taken at the A&E. The history recorded by three different members of staff is strikingly different to the account given by the plaintiff to the court about the cause of his injury. Even though the plaintiff gave evidence that the fall at work was of no consequence, when asked about the cause of his injury he told medical staff about the fall at work. He never mentioned falling on the pavement. Under cross-examination he was unable to give any adequate explanation for such a glaring omission.

[35] Given that the hospital notes are contemporaneous and given that the plaintiff accepted he did tell staff he fell at work and accepts he did not tell them about the fall on the pavement I find that the reason he did this was because his injury was due to a fall at work rather than a fall on the pavement.

[36] Secondly, when the plaintiff attended with Mr Elliott on 9 February 2010 it was clear that he had already been with his solicitor and therefore knew the importance of the contemporaneous notes and for this reason I find that he did ask Mr Elliott to amend his notes to record a different version of events to assist him with his claim. It is also noteworthy that even the proposed amendments he was asking Mr Elliott to make are inconsistent with the version of events he gave to the court in evidence. Notably, he indicated that he was walking to work and also stated that he fell and landed on a kerb. Given the locus of the alleged accident and the plaintiff's direction of travel and the width of the pavement I fail to see how he could have landed on the kerb. Again, this evidence was not consistent with the evidence given to this court.

[37] Thirdly, when the plaintiff spoke to Mr Kealy the plaintiff gave another inconsistent version of events stating that he was unable to go to work the next day.

[38] Fourthly, in the Claim Form the plaintiff answered two questions in a way which was diametrically opposed to what he said in evidence. His explanation initially to the court was that he was simply trying to say where the accident had happened. When challenged that his answers did not say where he fell, he then stated that he had not read the questions.

[39] I find it inexplicable that the plaintiff did not read the questions especially as he had already been to a solicitor and had received an information pack. He had clearly read and understood this pack as he proceeded to take photographs of the locus as requested. I therefore find he was very aware of the importance which would be attached to the answers in the Claim Form.

[40] Fifthly, the plaintiff identified a different locus at the site inspection to that given to the court. Given that the two defects are located in close proximity and the defects are similar in nature and as counsel for the defendant conceded, this alone would not be sufficient to undermine the plaintiff's credibility. I accept that a person could easily have made such a mistake. In the context of the other inconsistencies in this case however I find that this inconsistency lends more weight to the finding that the plaintiff did not sustain injury due to a fall on the pavement.

[41] Although there was delay in seeking medical treatment I note the plaintiff appears to have delayed seeking medical attention even after he allegedly sustained an aggravation of his injury at work on 5 January 2010. Delay alone, therefore would not have led to a finding that the plaintiff was not a credible witness.

[42] In assessing credibility I found the evidence the plaintiff gave in respect of his stumble at work on 5 January 2010 to be very revealing. When giving evidence he demonstrated to the court that he gripped or grabbed the corner of the desk to break his fall. Earlier he had indicated that he was unable to grip his toothbrush. If he had sustained injury as alleged the previous day due to a fall on the pavement he could not have broken his fall at work on the 5 January 2010 in the manner in which he described. I therefore find that he must not have sustained an injury on the previous day as described by him.

[43] I further note that there is no objective evidence such as abrasions to support the plaintiff's claim. I also note that he has no witnesses to support his claim. These matters alone may not carry great weight in respect of the issue of credibility but taken together with the other matters do lend corroboration to the view that the plaintiff's evidence lacks credibility.

[44] Finally, I have seen and heard the plaintiff. Whilst he was steadfast in stating he sustained the injury due to a defect in the pavement he was unable to give, even when presented with the opportunity to do so, any adequate or reasonable explanation for the inconsistencies in the documentation.

[45] For all these reasons I find that the plaintiff has not established on the balance of probabilities, that he sustained injury due to a defect in the pavement.

[46] Given the findings I have made I do not have to determine the second question, whether the defect was actionable.

[47] I therefore dismiss the plaintiff's claim and will hear counsel in respect of costs.