Neutral Citation no [2002] NIQB 56 | *Ref:* **SHEC3768**

Judgment: approved by the Court for handing down | *Delivered:* **11/10/2002**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

ANTHONY WIN CARVILLE

Plaintiff

and

DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND

Defendant

SHEIL J

JUDGMENT

[1] The plaintiff in this action is aged 26, having been born on 12 August 1976.

[2] On 2 February 1996 at approximately 5.00am the plaintiff, in the course of his part-time employment as a milkman with Mr Davidson, tripped and fell while delivering milk in Windsor Avenue, Portadown, which is a quiet residential cul-de-sac.

[3] While the defendant challenged the plaintiff as to where exactly he fell, I have no hesitation in accepting the plaintiff's evidence that he tripped and fell on the raised edge of the flagstone seen in photograph 1 of the set of three photographs taken by the plaintiff about one week after the accident.

[4] It was dark at the time of the plaintiff's fall. The nearest streetlight was on the far side of the road to that on which the plaintiff fell. There is now no allegation of breach of statutory duty in relation to the provision and maintenance of street lighting in Windsor Avenue.

[5] The defendant accepts that the raised edge of the flagstone as seen in the photograph, to which I have referred, constituted a danger for pedestrians such as the plaintiff, but the defendant by way of defence to the plaintiff's

claim relies upon the statutory defence provided by Article 8 of the Roads (Northern Ireland) Order 1980.

[6] Mr George, who was the Roads Maintenance Officer for Windsor Avenue and Windsor Road, gave evidence on behalf of the defendant in support of the statutory defence under Article 8. In doing so Mr George, quite understandably, is now relying solely upon the records kept by him at the time as he has no personal recollection now of the inspection carried out so long ago.

[7] Mr George's last inspection, prior to the plaintiff's accident on 2 February 1996, was carried out on 16 January 1996 at which time Mr George did not record any defect in Windsor Avenue, although he did record two potholes as requiring repair at the junction of Windsor Avenue and Windsor Road, as appears from his records. On Mr George's next inspection on 8 March 1996 he did record the raised edge of the flagstone, the raised edge measuring 28mm and accordingly requiring remedial work in accordance with the Department's own guidelines. A letter of claim had been written by the plaintiff's solicitors on 16 February 1996 but Mr George stated in evidence that he would not have been aware of that letter of complaint prior to his carrying out the inspection on 8 March 1996 when he noted the defect. The flagstone, as appears from the photographs taken by the plaintiff, was tilted, but not cracked, as seen in the photographs. The flagstone on the nearer side to the photographer as seen in the photographs is cracked. While Mr George did not make any record of the cracked flagstone, because the defect in that flagstone was less than 20mm, he did record that repairs were necessary over a distance of 4sqm, which would have included the cracked flagstone as well as the tilted flagstone. Repairs were carried out by the Department of the Environment on 4 April 1996, following Mr George's report of the defect on 8 March 1996. Mr George stated that, while now relying entirely upon his records, if there had been a tilted flagstone at the time of his inspection on 16 January 1996, as shown in the photograph subsequently taken by the plaintiff approximately one week after his fall on 2 February 1996, he would have noted it and recorded it as requiring repair.

[8] Mr Magill, Consulting Civil Engineer, gave evidence on behalf of the plaintiff. By the time he carried out an inspection of the footpath on 28 August 2002, there was no defect to be seen as the area had been repaired on 4 April 1996. Mr Magill stated that in his professional opinion the condition of the tilted flagstone, as seen in the plaintiff's photographs, could not have arisen in the short interval of time between Mr George's last inspection on 16 January 1996 and the plaintiff's fall on 2 February 1996. He stated that the flagstone must have been in that condition for some months, if not longer, prior to the photographs being taken approximately one week after the plaintiff's fall on 2 February 1996.

[9] While it seems likely that the cracked flagstone on the near side of the tilted flagstone, as seen in the photographs, was caused by a vehicle or vehicles mounting the footpath, Mr Magill did not consider that the same was true of the tilted flagstone, which he attributed to settlement. Whatever was the cause of that flagstone being tilted, the issue which the court has to decide is whether or not it was in that condition when Mr George carried out his last inspection on 16 January 1996 prior to the plaintiff's fall on 2 February 1996.

[10] I do not find this case an easy one to decide. On the one hand I have the evidence of Mr Magill, an independent Consulting Civil Engineer, who was called to give evidence on behalf of the plaintiff. On the other hand I have the evidence of Mr George, the Roads Maintenance Inspector, who impressed me as being an honest witness, although he was relying solely upon his records, and a conscientious Roads Maintenance Inspector. Even a good inspector, such as Mr George, can miss a defect on occasions.

[11] It is accepted by the Department of the Environment that the flagstone in that tilted condition constituted a danger for pedestrians such as the plaintiff. The onus of establishing, on the balance of probabilities, the statutory defence under Article 8 of the Roads (Northern Ireland) Order 1980 rests upon the defendant.

[12] Having seen the photographs for myself and having examined them carefully, I agree with Mr Magill and find as a fact that the tilted flagstone was in the condition seen in those photographs on 16 January 1996 and that regrettably, it was missed by Mr George, conscientious though he was.

[13] I hold therefore that the Article 8 defence raised by the Department in this case fails and that the plaintiff is entitled to damages.

[14] The plaintiff impressed me as being a very fine young man who, given that this accident occurred over six years ago, gave his evidence in a truthful manner to the best of his recollection and without any exaggeration on his part with regard to his injuries and the consequences for him as a result thereof.

[15] The court had the benefit of two medical reports from Mr Mackle FRCS, on behalf of the plaintiff dated 18 December 1996 and 20 August 2002, and a report from Mr Yeates FRCS, on behalf of the defendant dated 15 November 2000. Mr Yeates in his report stated that in his opinion "such a fall in a young healthy well muscled rugby player, would be unlikely to produce a situation were symptoms extended beyond some weeks approximately" and that "his propensity for developing low back pain is more likely to be related to his rugby activities rather than the simple fall which occurred in February 1996". Mr Yeates had stated earlier in his report that he found the

plaintiff to be "cooperative". Mr Mackle in his second report dated 20 August 2002, having referred to Mr Yeates' opinion, states:

> "Mr Yeates feels that the propensity for developing low back pain was more likely related to his rugby activity rather than the fall which occurred in February 1996. Whilst I accept that Mr Yeates is correct in that one would not normally expect a young, healthy, well muscled, rugby player to have such persistent symptoms, I found that Mr Carville was cooperative and I felt him to be genuine."

[16] I informed counsel in court that I found some difficulty in resolving the issue of the plaintiff's persistent back symptoms following the accident, having regard to the differing views expressed by Mr Yeates on the one hand and Mr Mackle on the other hand and gave counsel the opportunity of calling oral evidence on this point. Counsel decided however not to adopt this course of action and preferred that I would decide this issue based upon the credibility of the plaintiff. As already stated, I found the plaintiff to be a very fine young man who gave his evidence in a truthful manner and without any exaggeration on his part. As already stated Mr Yeates found him to be "cooperative", while Mr Mackle found him to be "cooperative" and "genuine".

[17] The plaintiff had no history prior to the accident of any problem with his back. I hold that on the balance of probabilities the plaintiff's back condition was caused by his fall on 2 February 1996 and not by his active participation in rugby prior to that date.

[18] The plaintiff sustained a laceration to the ring finger of his left hand and a blow to his left elbow. His father took him to Craigavon Hospital that morning where the laceration was repaired by the insertion of five sutures and his left elbow was cleaned up. The plaintiff's main complaint in the months which followed the accident relate to his back, to which I have already referred. The Accident and Emergency notes at Craigavon do not record any injury to the plaintiff's back, although the plaintiff stated that he told the hospital that he had hurt his back. On 7 February 1996, the accident having occurred on 2 February 1996, the plaintiff attended his general medical practitioner who referred him with his back to Craigavon Hospital. The plaintiff attended that appointment as arranged but, having waited for over three hours without being seen, decided to leave the hospital and to seek assistance from a Mr McCollum, a Physiotherapist, who attended regularly at Portadown Rugby Club, where the plaintiff played. The plaintiff was advised by Mr McCollum that he should not play rugby again until he was given "the o.k.". The plaintiff duly carried out the physiotherapy exercises directed by

Mr McCollum. He was unable to return to rugby before the end of that rugby season in June 1996. The rugby season resumed in September 1996. At that stage the plaintiff was still having trouble with his back and accordingly missed out and lost his eligibility for selection. The plaintiff's evidence as to his blossoming rugby career prior to the accident was not challenged by counsel on behalf of the defendant. The plaintiff has not played rugby since the accident because of the condition of his back.

[19] At the time of the accident the plaintiff was a student, having enrolled in 1993 on a three year course in sport and leisure studies at Lisburn College of Further and Higher Education. While he eventually completed the course following the accident, he only achieved a pass, having previously obtained a distinction in earlier years. He was offered a place at an English university to do a further year in sports' science, but decided not to take up that offer because by that time he had decided that he must rethink his career having regard to the persisting problems with his back. Eventually in September 1999 he started his own business which dealt with diets, vitamins and advice in relation to contact sports, but does not involve any physical activity by way of playing rugby or training people in that sport. He subsequently developed high blood pressure and palpitations, which he attributes to the long hours which he worked in setting up and running his business since September 1999. While there is no medical evidence on this point, he may well have developed this condition in any event and that this may have blighted his future career in rugby, either by way of playing for his country or by way of training rugby players.

[20] There is no claim for loss of earnings, save for the plaintiff's loss of part-time earnings as a milkman for a 42 week period at £40 per week. I allow by way of special damage this sum of £1,680.

[21] The plaintiff states that his back is now all right as long as he avoids contact sports. I award the plaintiff the sum of £17,500 for general damages including loss of amenity by reason of his having to give up his rugby career which, as already mentioned, might well have occurred in any event when he developed high blood pressure and palpitations, which fact I have taken into account in assessing the appropriate sum by way of general damages.

[22] I award interest on the £17,500 for general damages at the rate of 2% per annum from the date of service of the writ of summons until the date of trial and on the special damage of £1,680 at the rate of 6% per annum from the date of service of the writ of summons until the date of trial.