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2016 No 74323

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

CAROL HIGGINS

Plaintiff

and

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant

MAGUIRE J

The accident

[1] The plaintiff in this case is Carol Higgins. She is currently 41 years of age. She lives at 5 Lenamore Park, Londonderry. Her case is that on 2 February 2014 at around midnight she had gone out of her house to see if she could get batteries from her car which was parked on the roadway. She checked her car but could not locate batteries in it. Thereupon, she decided to go to her husband's car for the same purpose. She went across the road back towards her house as her husband's car was parked in the driveway of the house. She says that as she approached her driveway her foot went down into some sort of declivity and she came up against a hard surface. This caused her to pitch forward. She put her left hand out to break her fall and went down causing her a nasty injury to her left arm.

[2] The court need not describe her injuries in detail as quantum is agreed in this case.

[3] The area at which she fell was reasonably well lit as there was a nearby street light which was working. At the time the plaintiff was wearing flat heeled boots.

[4] After the accident, her husband, who had been inside the house looking after the couple's baby then just 8 months old, began to wonder why the plaintiff had not returned. He went out to see where his wife was. His evidence was that when he did so he found his wife on the ground outside the house crying. He helped her up and they went inside. They decided to leave the baby at the plaintiff's mother's

house. Having done so, they went to Altnagelvin Hospital. There the plaintiff was treated. Sometime in the early hours of the morning the couple returned to their house but it was not until later that day that the two more closely examined the question of what had caused the accident. It appears that they discovered a pothole type feature which was in a gap between the bitmac road surface and the concrete divider between the road surface and the plaintiff's driveway. Neither of them had noticed this before. Later on the same day, Mr Higgins said that he casually filled in the hole with stones and grit and sand. At this stage no photographs of the defect were taken.

The general area of the accident

[5] It appears clear and was not in dispute that the locus of the accident was a small residential estate which had been built relatively recently. It was a cul-de-sac within the estate where the plaintiff and her family lived. The cul-de-sac served around 10 properties, including the plaintiff's. Plainly it would not be likely to have had any significant heavy vehicular traffic going through it. Nor would it have a heavy footfall.

[6] Perhaps an unusual feature of the cul-de-sac was that it had no footpaths in the conventional sense. Consequently at the plaintiff's house there was simply a divider between the boundary of her property and the roadway. The court will refer to this as the "kerb-line". In effect it was a white concrete strip. The kerb-line was approximately 15mm above the level of the bitmac road and was not merely decorative. It served to demarcate the boundary between the private property and the road but it also served as an edge for the laying of the bitmac road surface and as a drainage line.

Chronology of later events

[7] The sequence of events after the accident appears to be that:-

(a) For a time nothing of significance occurred. The plaintiff was trying to recover from her injuries and family life was disturbed for a period. From time to time, but not in an organised way, the plaintiff's husband said that he topped up his casual repair at the pothole.

(b) In July 2014 the couple consulted a solicitor about the accident. This resulted in the couple later that month photographing the site of the accident using a ruler to try to show the depth, length and breadth of the defect at that time. The depth at the pothole's deepest point seems to have been at most (making all reasonable allowances in the plaintiff's favour) 15mm to the road surface.

(c) A claim form was submitted to the Roads Authority on 7 October 2014. Under the heading "What caused the accident?" It stated:

> "Erosion of tarmac outside the house on the road which resulted in a large gap/hole forming against the low rise kerb along the road. This caused my trip and fall".

The form was accompanied by photographs taken by Mr Higgins at 2.00pm on 14 September 2014.

(d) As a result of the claim form being submitted, a site visit was arranged for 28 October 2014. Present at this was the plaintiff and Mr Coyle, an Engineer and Claims Investigator, for the Roads Service. Mr Coyle's written report indicated that the plaintiff said that she was going from the area where her car was parked to home at the time of the accident. As regards the alleged cause of the accident it recorded that there was "slight damage to bitmac at kerb face on carriageway … caught foot on face of kerb and stumbled forward breaking wrist on step to property". As is usual in a site visit of this sort, Mr Coyle took a number of photographs depicting the scene of the accident. The defect was measured by Mr Coyle, who had been investigating claims of this sort since 1987. His measurements, as related to the court, where that the defect was at its deepest 16mm below the road surface; lengthwise, he measured it at 170mm; its width was 75mm.

Following the inspection Mr Coyle told the court that he would not have expected the defect to have been picked up by the staff who do periodic inspections as they were ordinarily required only to pick up potholes of a depth of 20mm plus. He also told the court that if he himself had considered the pothole, at a site visit, to be dangerous to members of the public he would have reported it straightaway. However, he was not of this view and he did not report it at that time or later, notwithstanding that (as indicated below) he did return to the site to look at it again in 2017. Mr Coyle was of the view that the relevant measure of depth was 16mm and he rejected the view that to obtain a proper measurement he should have measured to the top of the kerb-line.

(e) A Consulting Engineer, Mr Vincent McBride, instructed on behalf of the plaintiff, inspected the site on 6 March 2015 (over a year after the accident). At that time he also took measurements and photographed the area. His measurements were that the defect was 160mm x 80mm with a maximum depth of 33mm. However, this last figure (depth) was based on the deepest part of the defect to the top of the kerb-line, which itself stands proud of the bitmac road. He noted that the depth at the deepest point of the defect to the road level was 18mm. When he used a metal spike to puncture the surface of the defect to determine the depth to which it would go he found this depth to be a further 2-3mm. Thus he considered this could be added onto the figures he had already provided. He did not think that the kerb-line which itself was 15mm in height, measured from the road surface, presented any foreseeable danger. In his report he stated, in connection with the kerb-line, that "no

uplift stride action is generally required to move from the road to the kerb and onto the private property". He was of the view that the defect could accommodate the front of the foot and be a potential tripping hazard. However he went on to say that the pothole was "not manifestly defective" but shortly after the entry of the front of the foot into it the foot would contact the straight vertical edge of the kerb face. Given his view that the proper measurement of depth was 33mm, in his opinion, it constituted a significant tripping face. He felt that the cause of the defect may have been action created by frost but he accepted that he could only speculate in this regard.

(f) Mr Coyle revisited the site on a date in 2017. He took photographs. By this time it was 3 years and more after the date of the accident. As his photographs show the defect had become inhabited by weeds. In these circumstances he took no measurements at this time. Nor did he take any form of remedial action in respect of the defect.

Legal principles

[8] While the court was helpfully provided with a wide range of legal authorities including *White v Department of the Environment [1988] 5 NIJB 1; Frazer v Department of the Environment [1993] 8 NIJB 22; McQuillan v Department of Regional Development [2009] NIQB 36; Smyth v Department for Regional Development* and *McClenaghan v Department of the Environment GIRJ2038,* and has considered these, it will not be necessary to discuss each case in depth.

[9] However, it is essential that the court should set out the terms of the Roads (Northern Ireland) Order 1993 which are important for present purposes and to summarise the main legal principles.

[10] As regards the former, Articles 8(1), 8(2) and 8(3) of the 1993 Order, where relevant, state 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 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 –
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> (a) that the Department has 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 …".

(3) For the purposes of a defence under paragraph (2) (a) the court shall in particular have regard to the following matters-

(a) the character of the road, and the traffic which was reasonably expected to use it;

(b) the standard of maintenance appropriate for a road of that character and used by such traffic;

(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 that 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 expect to repair that part of the road before the cause of action arose, what warning notices of its condition had been displayed;

but, for the purposes of such a defence, it shall not be relevant to prove that the Department had arranged for a competent person to carry out or supervise the maintenance of the part of the road to which the action relates, unless it is also proved that the Department had given him proper instructions with regard to the maintenance of the road and he had carried out the instructions…".

[11] As regards the latter – legal principles - Gillen J has helpfully summarised the relevant principles governing an action of this sort in the course of his judgment in *McKee v The Department for Regional Development [2013] NIQB 94.* He said:

"[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 be 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."

[12] As Mr Bentley relied strongly on a passage from the judgment of Girvan J in *McClenaghan* the court will set out the passage below:

> "3. The determination of the question whether the road was dangerous is a question of fact and degree the test for dangerousness being objective (see *Rider v Rider* [1973] 1 QB 505). In *Keenan v Department of the Environment* I referred to various ways in which the test has been expressed. For the reasons set out in my judgment I consider that the most comprehensible and workable formulation of the test is that stated by Lord Denning in *Morton v Wheeler* (31 January 1976 Bar Library No 33) cited in *Dymond v Pearse* [1972] 1 QB 496 and approved by the Court of Appeal in *Rider v Rider* [1973] 1 QB 513 where he stated:
>
> > 'If a reasonable man, taking such contingencies into account, and giving close attention to the state of affairs, would say 'I think there is quite a chance that someone going along the road may be injured if this stays as it is', then it is a danger; but if the possibility of injury is so remote that he would dismiss it out of hand saying of course it is possible but not in the least probable then it is not a danger'."

The court's assessment

[13] The court sees no reason why it should not accept the plaintiff's account of how the accident occurred. She gave her evidence about the accident in a straightforward way and her account was coherent and believable. The court did not have the impression that she was over-stating matters or that she had devised her evidence simply for the purpose of sustaining a claim.

[14] Likewise the court considers that the plaintiff's husband's evidence about events after the accident could be relied on.

[15] The court will therefore find as a fact that the accident happened in the way in which it was presented to the court and that the aftermath of it was faithfully described in the evidence of the plaintiff and her husband.

[16] In addition the court believes that both Mr McBride and Mr Coyle were witnesses who, from differing perspectives, were providing the court with careful assessments of the locus at the time when they inspected it. However, while the court will take their evidence into account, it considers that the best evidence it has of the state of the roadway at the time of the accident is that of Mr Higgins. On this basis, the court will find as a fact that the depth of the defect at its deepest point was 15 mm to the surface of the road. The court is not attracted to the proposition that the measurement of the defect's depth should be to the level of what has been described as the 'kerb line'.

[17] There is no real dispute in this case that the operative position at all material times in this case in relation to Departmental inspections of the area was that it was subject to an acceptable cycle of inspections every 4 months and that inspectors were instructed to record in their records defects which involved a more than 20 mm difference in level.

[18] However, the Department in this case cannot rely on an inspection defence because it has not provided the court with evidence from its inspectors as to what occurred *vis a vis* this location in terms of the inspections which the Department contends were carried out. On this issue, the onus of proof is on the defendant and it has not called evidence which itself would demonstrate that it has taken the requisite level of care to secure that the part of the road to which the action relates was not dangerous for traffic.

[19] This means that the plaintiff will succeed in this case provided the court is satisfied that it has been proved to the standard of the balance of probabilities, the onus on this issue being on the plaintiff, that the roadway in question at the time of the accident was a danger in the sense set out in the authorities referred to above. It is therefore to this issue that the court will turn.

Dangerousness

[20] In this case the court is satisfied that the location of this accident is not one where there would be an intensity of vehicular or pedestrian use. On the contrary, the accident occurred in a quiet cul-de-sac which would have light vehicular and pedestrian usage. This is relevant as Shiel J stated in *Frazer* that "A defect in the highway, be it on the road or the footpath, at the end of a little used cul-de-sac is not to be regarded in the same light as a defect of the same dimensions and nature on a busy part of the highway" (see page 38).

[21] The place of the defect was at the edge of the road where it met the kerb line. This would not be an area which would often be traversed and where it was traversed it would usually, it seems to the court, be stepped over by a pedestrian either going from the roadway to (as in this case) a private house or vice versa where the pedestrian is stepping from a private house onto the roadway. In terms of a pedestrian's journey in either direction the likelihood is he or she would seldom step forward in such a manner as would take the person into a position so close to the kerb line. In most cases, in anticipation of the presence of the kerb line, it would be expected that a pedestrian would adjust their stride so that, in a single step, he or she would cross over this point.

[22] It seems to the court, therefore, that it is difficult to regard this particular defect as presenting a real source of danger in the light of the its dimensions and when placed in its surroundings. To use the language of Steyn LJ in *Mills*, while in one sense it is reasonably foreseeable that any defect in the highway, however slight, may cause an injury, this is not what is meant by 'dangerous' in this context: "[i]t must be the sort of danger which an authority may reasonably be expected to guard against".

[23] The court, therefore, is of the view that the answer to the question posed at paragraph 3 of page 4 of Girvan J's judgment in *McClenaghan* is that the reasonable person would be unlikely to declare this defect as a danger but would more likely take the view it creates only a remote possibility of injury. Of that possibility, the court thinks it would be said 'of course it is possible but not in the least probable'.

[24] In reaching its conclusion the court has carefully examined the photographs of the area in question paying greatest attention to those photographs which are closest in time to the date of the accident.

[25] The court also accepts that the criterion of dangerousness should not be applied in accordance with what has been described as 'mechanical jurisprudence' under which there is an unthinking adherence to the 20 mm standard. In reaching its conclusion the court has viewed the defect in its individual setting having regard to all the circumstances of the accident, including the fact that neither the plaintiff nor her husband had noticed it prior to the accident.

[26] While the court has considered the authorities brought to its attention the factual scenario of particular cases rarely will be the same and the reality will be that each case will depend on its own facts. As Mr Bentley relied on *McClenaghan*, the court notes that in that case the area of the defect was described as being on a section of footpath relatively frequently used, in contrast to the usage in this case. Moreover, the court also notes that in that case the section engineer for the Department accepted that the locus presented a hazard to pedestrians, which is far from the case before the court, where the experienced claims investigator gave evidence that the he did not, during the course of two inspections, form the view that the defect should be reported as dangerous, irrespective of its failure to meet the 20 mm threshold.

Conclusion

[27] The court has not been persuaded to the view that the defect in this case rendered this portion of the roadway dangerous. As this standard is a *sine qua non* to the plaintiff's success in these proceedings, the court is obliged to dismiss these proceedings, notwithstanding that it accepts the plaintiff's account of how the accident happened. This is a function of the fact that the obligation on the roads authority is not based on strict liability and not every defect on a footpath or roadway renders the area concerned actionable in legal terms.