Neutral Citation no. [2006] NIQB 99 | *Ref:* **HIGF5539**

Judgment: approved by the Court for handing down | *Delivered:* **5/4/2006**
*(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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Between:

JENNIFER SPIERS (a Minor) by her mother and next friend Jean Spiers

Plaintiff/Respondent;

-and-

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant/Appellant;

_____

HIGGINS J

[1] This is an appeal against the decision of District Judge Collins, sitting as a Deputy County Court Judge, whereby the defendant/appellant's application to strike out the plaintiff/respondent's civil bill was dismissed. It is necessary to set out the history of this case in some detail.

[2] The plaintiff/respondent (hereafter referred to as the respondent) was born on 1 September 1987. On 23 May 1996 she was skateboarding in an alleyway at the rear of her parents' home at 8, Rooney Park, Kilkeel in County Down when she was injured. She was kneeling on the skateboard and proceeding down the alleyway when the front wheels of the skateboard caught the metal edge of a defective toby frame, throwing the respondent forward and causing her to strike her teeth on the flagstones. The lid of the toby was missing and therefore defective. The lid had been replaced with a piece of wood by someone, but the wood was not level with the surrounding metal edge of the toby frame. The skateboard crossed part of the wood but caught the metal edge of the metal frame.

[3] The respondent issued a civil bill against the Department of the Environment, the predecessor of the defendant/appellant (hereafter referred to as the appellant) and the NIHE. The civil bill proceedings were successful against the Department of the Environment only. The Department appealed the decision to the High Court. There was no cross-appeal. Sheil J allowed the appeal. There was no appeal against that decision, which appeal could only be by case stated.

[4] In the course of his judgment on the appeal Sheil J stated -

> "If the minor plaintiff had been a pedestrian who had tripped on this defective toby, I would be satisfied that the Department of the Environment was in breach of its duty to maintain the alleyway under Article 8(1) of the Roads (Northern Ireland) Order 1992 and that the Department had not established the statutory defence set out in sub-sections 2 and 3 of Article 8 of the said Order."

[5] During the County Court appeal in the earlier proceedings Sheil J was referred to Ingram v The Department of the Environment, an unreported decision by O'Donnell LJ in a High Court action. In Ingram's case the plaintiff was teaching his son to skateboard. When demonstrating how to do so he hit a toby with a defect similar to the defect in the present case, and was injured. The transcript of the hearing before O'Donnell LJ was available to Sheil J. This disclosed that during the hearing O'Donnell LJ observed that he did not think the use of a skateboard was " a normal use" of the highway or that the department owed a duty to maintain the pavements to a standard where skateboards could be used. The case was dismissed at the end of the plaintiff's case on application by counsel for the department. An appeal to the Court of Appeal was dismissed. The appeal was heard by Kelly LJ and McCollum J and judgment delivered by McCollum J. In the course of his judgment in the County Court Appeal Sheil J referred to Ingram's case and stated –

> "McCollum LJ, who delivered the brief ex tempore judgment of the court, has been able to turn up his notebook for that hearing in which he recorded the reasons given by the court for affirming the judgment of O'Donnell LJ as follows:
>
> > 'The ratio of the court's decision is that the duty on the Department in relation to footpaths is that footpaths should be safe for pedestrian traffic with all the appurtenances that might reasonably be

> expected to accompany such traffic. There is no duty to make the footpaths safe for other kinds of traffic such as bicycles and, a fortiori, for activities which may not even fall properly within the description of "traffic".
>
> The emphasis is on pedestrian use which would include other ancillary activities such as wheeling prams etc. All kinds of pedestrians are to be taken into account, that is all the kinds of pedestrian use that can reasonably be anticipated.
>
> The court takes the view that this does not impose a duty on the Department to make the footpaths safe for the use of skateboards'."

That decision of the Court of Appeal is binding on this court and accordingly, I have to dismiss the plaintiff's claim.

[6] In 2002 another action, Madden v The Department of the Environment, came before the Queen's Bench Division of the High Court. The plaintiff, then aged 8 years of age, was injured while rollerblading on the pavement. One of the rollerblades caught in a hole in the pavement caused by the absence of a lid on a toby. The case came before Sheil J who, on 19 April 2002, gave judgment, dismissing the plaintiff's claim for damages. In dismissing the claim Sheil J held that he was obliged to follow the unreported decision of the Court of Appeal in Ingram v Department of the Environment, supra. It was not in dispute that the defect would have made the pavement dangerous for pedestrians and the department did not seek to rely on their statutory defence under Article 8(2) of the 1993 Order. The case was appealed to the Court of Appeal. The Court of Appeal (Carswell LCJ, Nicholson LJ and Coghlin J) allowed the appeal. At paragraph 10 of his judgment Carswell LCJ described the duty owed by the department road authority to such users of the highway in these terms –

> "[10] The nature of the use made of the road by the particular user will nevertheless be material in two ways. In the first place, as appears from the terms of Article 8(3), the standard of maintenance will depend to an extent upon the traffic which is reasonably expected to use the road (and the manner in which that traffic may be expected to do so). Accordingly, if

> the balance of a rollerblader skating on the footway is upset by an unevenness which would not be a danger to foot passengers, and he falls and is injured, the road authority should not be liable. Secondly, if a person uses the road in a reckless fashion, for example, by riding a motor cycle at speed on the footway, and is injured by reason of a defect which would constitute a danger to pedestrians, his damages may be reduced for contributory negligence, or in an extreme case his claim might be defeated by the defence of *volenti non fit injuria.*
>
> [11] I accordingly conclude that in principle the respondent road authority did owe a duty to the appellant and that her claim should not be barred on the ground accepted as valid by the judge."

Later the Lord Chief Justice stated his conclusion -

> "[18] In the present case it was not in dispute that the hole created by the absence of the toby lid would have constituted a danger to pedestrians and the respondent Department did not rely on the statutory defence. This is in my opinion sufficient to conclude the case in favour of the appellant. Since she was injured by reason of that defect she is entitled to recover against the Department. In view of her age, the issue of contributory negligence is unlikely to arise, but we shall leave that to the trial judge. I would allow the appeal, remit the action to the judge to assess damages, determine the extent of any contributory negligence and enter judgment for the appellant for the appropriate figure."

[7] Following this decision the respondent's solicitor wrote on 12 November 2003 to the Crown Solicitor's Office in the following terms, inter alia, -

> "The minor Plaintiff in this case had had her award of damages removed by reason of Sheil Js understandable misapplication of the scant information available in relation to the Ingram case. The unavailability of a reported decision in Ingram undoubtedly inhibited both Plaintiff and Defendant in their presentation of the case before Sheil J. Given the findings of fact made in the County Court and by

Sheil J. on appeal it is now clear that our client is entitled to compensation for the injuries sustained by her on 23rd May, 1996. We are advised by Senior Counsel and believe that Sheil J. is not longer seised of this matter and that procedurally her cause of action has been determined.

We are also advised that our client is entitled to issue fresh proceedings with a view to having this issue re-litigated in order that the law may be properly applied to her case against the Department. Quite apart from the justice and equity of her claim against the Roads Authority you will also appreciate that there is a human rights aspect to this case where effectively, an emanation of government - your Department - has benefited from the application of an unreported decision of a superior court. This arose in a situation where the Plaintiff did not have the opportunity of arguing the relevant issues by reason of the unavailability of the Ingram case.

We write to request you to set out your proposals for compensating our client. It is our view that she is entitled to the damages which were awarded in her favour by the County Court Judge together with interest. If this benefit can be secured for our client then no further proceedings will be necessary. If this cannot be achieved then our client will issue fresh Civil Bill proceedings and in anticipation of any res judicata argument on behalf of the Department we put you on notice of our clients intention to rely upon the House of Lords decision in Arnold and Others -v- National Westminster Bank (1991) 3 AER 41. It is our view that the former proceedings have been concluded and as our client was legally aided her costs have been paid by the Legal Aid fund. On the basis of Senior Counsel's opinion we will obtain Legal Aid for the issue of fresh proceedings. It seems to us that before issuing these proceedings the Defendant should have the opportunity of compensating our client with an award of £5,000 plus interest and we put you on notice that we have authority to accept this amount upon your undertaking to be responsible for our reasonable legal and professional costs to date. We have also considered whether or not any such settlement would require the approval of the Court:

> we take the view that the quantum of the settlement was, de factor approved by the County Court Judge and that no further approval is necessary."

[8] On 20 October 2004 the respondent's solicitor issued an ordinary civil bill claiming £5,000 damages for personal injuries sustained by the respondent by reason of the negligence, nuisance and breach of statutory duty of the appellant relating to the maintenance of the surface of the alleyway at Rooney Park, Kilkeel, on 23 May 1996. On 2 February 2005 the appellant issued a notice to strike out the civil bill on the ground that the respondent's claim disclosed no cause of action against the appellant "due to the [respondent] being barred in bringing proceedings by reason of the principle of cause of action and issue estoppel in that the issues have already been determined and decided by a recognised Court ". The notice also alleged that the new civil bill was an abuse of process and on public policy grounds should not be allowed to proceed. The deputy County Court Judge dismissed the application to strike out on 22 April 2005. The department now appeals that interlocutory decision. There is no specific procedure under the County Court Order or Rules for an appeal against an interlocutory order. In those circumstances, by virtue of Article 34 of the County Court Order (NI) 1981 the rules of the High Court apply.

[9] It was submitted by Mr Millinson, who appeared on behalf of the appellant, that the new civil bill could not proceed as it was estopped by cause of action estoppel. Alternatively if this was not cause of action estoppel but issue estoppel. a change in the law could not amount to a special circumstance sufficient to enable fresh proceedings to be brought. There had to be finality in litigation proceedings and that occurred when the time limit for a case stated expired after the appeal hearing before Sheil J.

[10] Mr Brangham QC, who appeared on behalf of the respondent, submitted that issue estoppel applied in this instance and not cause of action estoppel and that there were special circumstances relating to the manner in which the decision came about that justified the issue of fresh proceedings. He relied on Arnold & Oths v National Westminster Bank Plc 1991 2 AC 93. He submitted that in principle the present case is no different from the circumstances in Arnold's case. He identified the issue on which the respondent did not succeed before Sheil J as the determination of the duty owed by the road authority to skateboarders. The special circumstances relied on were that in the appeal hearing before Sheil J, the learned trial judge had relied on an incomplete record of the judgment of the Court of Appeal in Ingram's case and had applied the reasoning of McCollum J. It was submitted that in deciding Madden's case at first instance, Sheil J had obtained a note of the reasoning of Kelly LJ in Ingram's case and then expressed doubts as to the correctness of the approach adopted by the Court of Appeal and encouraged a further appeal to the Court of Appeal. Alternatively it was argued that even

if this was cause of action estoppel there is no absolute bar on bringing fresh proceedings in cause of action estoppel. It was suggested that if the action was brought now the respondent would be successful and it would be inequitable if the respondent was denied a remedy – " a blot on our jurisprudence" was the way it was expressed.

[11] Which form of estoppel is this and does Arnold's case apply? Cause of action estoppel arises where the subsequent cause of action is identical to that in earlier proceedings, involves the same parties and the same subject matter. Issue estoppel arises where a particular issue, necessary to a cause of action has been litigated and decided between two parties and in later proceedings between the same two parties in a different cause of action, one of the parties seeks to re-open that particular issue.

[12] In Arnold's case Lord Keith gave the leading opinion. He analysed the two types of estoppel and the differences between them. He commenced at page 104 C in these terms -

> "It is appropriate to commence by noticing the distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened. The rule in Scotland, which recognises the doctrine of res noviter veniens ad notitiam, is different: see Phosphate Sewage Co. Ltd. v. Molleson (1879) 4 App.Cas. 801, 814, per Lord Cairns L.C. There is no authority there, however, for the view that a change in the law can constitute res noviter. The principles upon which cause of action estoppel is based are expressed in the maxims nemo debet bis vexari pro una et eadem causa and interest rei publicae ut finis sit litium. Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action. In

Henderson v. Henderson (1843) 3 Hare 100, 114-115, Sir James Wigram V.-C. expressed the matter thus:

> 'In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time'."

At page 105E he turned to issue estoppel and stated -

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue. This form of estoppel seems first to have appeared in Duchess of Kingston's Case (1776) 20 St.Tr. 355. A later instance is Reg. v. Inhabitants of the Township of Hartington Middle Quarter (1855) 4 E. & B. 780. The name "issue estoppel" was first attributed to it by Higgins J. in the High Court of Australia in Hoysted v. Federal Commissioner of Taxation (1921) 29 C.L.R. 537, 561. It was adopted by Diplock L.J. in Thoday v.

Thoday [1964] P. 181. Having described cause of action estoppel as one form of estoppel per rem judicatam, he said, at p. 198:

> 'The second species, which I will call "issue estoppel", is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was'."

[13] Does the instant case give rise to cause of action estoppel or issue estoppel and is Arnold's case supportive of the respondent's submissions. Following her injury when skateboarding in the alleyway at the rear of Rooney Park, Kilkeel on 23 May 1996 the respondent (the plaintiff then) issued proceedings for damages against the road authority, then named the Department of the Environment. Those proceedings concluded with the judgment of Sheil J on 11 September 2000. The proceedings, the subject of the present appeal, were issued on 20 October 2004. In these proceedings the plaintiff (the respondent to this appeal) claims damages in respect of the same accident against the same defendant (the appellant in this appeal) based on the same alleged failure of the defendant to maintain the public

highway. All the issues are the same. It is clear to my mind that this raises cause of action estoppel as opposed to issue estoppel.

[14] Reliance was placed on Arnold's case supra and it was submitted the principle involved in each case is the same. Arnold's case was one of issue estoppel. It concerned the operation of periodic rent reviews in a 32 year sub-lease following an appeal from an arbitrator to the High Court. The facts may be taken from the headnote –

> "Under a lease between the defendant landlords and the plaintiff tenants there was provision for rent reviews at approximately five-yearly intervals, such reviews to be carried out partly by reference to a hypothetical lease for the unexpired residue of the term. On the first review, in 1983, a dispute arose between the parties as to whether or not the hypothetical lease was to be construed as itself containing rent review provisions. Walton J. held, on an appeal from an arbitrator, that it was not to be so construed. He refused a certificate under section 1(7)(b) of the Arbitration Act 1979 that the question of law was one which ought to be considered by the Court of Appeal, and the Court of Appeal held that no appeal lay from that refusal. Judicial decisions, including two in the Court of Appeal, given after Walton J.'s judgment, indicated that his decision on the construction point was wrong. Before the second review became due in June 1988, the plaintiffs brought an action for, inter alia, determination of the basis on which rent reviews under the lease were to be conducted. On an application by the defendants to strike out that claim on the ground that the plaintiffs were barred by issue estoppel from relitigating the point decided by Walton J., Sir Nicolas Browne-Wilkinson V.-C. held that the plaintiffs were not barred. The Court of Appeal dismissed the defendants' appeal."

The defendants appeal to the House of Lords was dismissed. It was held –

> "dismissing the appeal, that although issue estoppel constituted a complete bar to relitigation between the same parties of a decided point, its operation could be prevented in special circumstances; that where further material became available which was relevant to the correct determination of a point involved in

> earlier proceedings but could not, by reasonable diligence, have been brought forward in those proceedings, it gave rise to an exception to issue estoppel, whether or not that point had been specifically raised and decided; that such further material was not confined to matters of fact but that where a judge made a mistake and a higher court overruled him in a subsequent case, justice required that the party who suffered from the mistake should not be prevented from reopening that issue when it arose in later proceedings; and that, accordingly, the plaintiffs ought to be permitted to reopen the question of construction decided against them by Walton J."

[15] The factual matrix in Arnold's case was very different from the instant case. In Arnold's case successive rent reviews had to be considered each of which would be proceeding "on a construction which was highly unfavourable to [the tenant] and generally regarded as erroneous" – see Lord Keith at p.110. Furthermore as Lord Keith stated on the same page "the landlord would be receiving a very much higher rent that he would be entitled to on a proper construction of the lease". Lord Keith went on –

> "The public interest in seeing an end to litigation is of little weight in circumstances under which, failing agreement, there must in any event be arbitration at each successive review date. Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the plaintiffs permission to reopen the disputed issue."

[16] Lord Lowry after expressing initial misgivings about dismissing the appeal delivered a concurring speech agreeing with Lord Keith. At p.111 he said –

> "The accepted principle of finality seems to have been applied equally to each branch: the decision of an issue which was essential to the decision of the action was treated in the same way as the decision of the action itself. In one way the logic of not distinguishing issue estoppel from cause of action estoppel is unassailable. If the decided issue was crucial in the first action, it remained crucial in the

> second, and the important point was that the issue was decided (not neglected or overlooked, as in non-issue estoppel) and was essential to the decision of the first action; it was therefore equivalent to the decision itself and was an equally great obstacle to a claim in the second action."

[17] Lord Lowry concluded that the rule that issue estoppel constitutes a complete bar to relitigating a point once it had been decided could and should be relaxed, but only in exceptional circumstances and that in Arnold's case the circumstances were "special and indeed exceptional". If the instant case involved a question of issue estoppel I do not consider the circumstances could be considered either special or exceptional. A case was brought, the facts proved and a decision based on existing precedent was arrived at.

[18] Cause of action estoppel is an absolute bar in relation to all points decided in the earlier judgment. Exceptional circumstances apart, it applies to points which properly belonged to the subject of the earlier litigation and which the parties exercising reasonable diligence might have brought forward at that time. The instant case does not concern points not brought before Sheil J. The issue of the duty owed by the appellant road authority to users on skate boards was considered. Sheil J found himself bound by the earlier decisions of the Court of Appeal, which were held subsequently to be incorrect.

[19] For all those reasons I find that the respondent is estopped from bringing the present proceedings as the issue and subject matter of them has already been decided in earlier litigation between the same parties. The appeal is allowed.