Neutral Citation No.: [2009] NIQB 36 | *Ref:* **McCL7483**

Judgment: approved by the Court for handing down | *Delivered:* **20/04/09**

*(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:

LISA McQUILLAN

Plaintiff;

-and-

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant.

_____

McCLOSKEY J

[1] The Plaintiff's date of birth is 22nd May 1972 and she is now, therefore, aged thirty-six years. She resides in Keady, County Armagh. She claims damages for personal injuries alleged to have been sustained by her arising out of an accident which she claims to have befallen her during the early hours of 29th December 2003. Her case is that she lost her balance and fell when walking in a public area in the Caramoyle Housing Estate in Keady. Specifically, the locus of her alleged fall is a car parking bay which adjoins the vehicular carriageway and interrupts a typical pedestrian footway. The essence of the Plaintiff's case is that her fall and resulting injuries were caused by a depression in the bitmac surface of the parking bay.

[2] The Defendant contested liability, on two main grounds. The first was that the Plaintiff's fall had been caused by slipping on ice, unrelated to the alleged depression in the surface in question. The second was that the Defendant was not liable to compensate the Plaintiff in any event, as it had discharged such legal duty as was owed to her. The duty in question is familiar to most practitioners, being enshrined in Article 8(1) of the Roads (Northern Ireland) Order 1993 ("*the 1993 Order*"), in the following terms:

> "*The Department shall be under a duty to maintain all roads and for that purpose may provide such maintenance compounds as it thinks fit*".

Article 8(2) provides:

> "*(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) to prove –*
>
> *(a) that the Department had 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 …*".

The Defendant invoked the so-called "statutory" defence, on the ground that the locus of the Plaintiff's alleged accident had been the subject of sufficiently frequent inspections by its personnel, giving effect to a policy whereby defects or depressions with a depth of 20 mm or greater would be identified and subsequently remedied. It was accepted by the Defendant, realistically in my view, that no issue arose as to contributory negligence. Accordingly, the Plaintiff will either succeed in full or not at all.

[3] The first plank of the Defendant's defence rested on a series of ambulance and hospital records. To begin with, there was the Northern Ireland Ambulance Service Patient Report Form, compiled in the immediate aftermath of the accident at the home of Bernadette Mallon, who resides at 47 Crainmore Road, Keady. The evidence was that the Plaintiff and Miss Mallon are lifetime friends and the Plaintiff, accompanied by her niece (Miss Toal), had just visited Miss Mallon immediately prior to her alleged accident. The record contains the following material entry:

> "*31 year old lady slipped on ice and fell*".

On its face, the record was compiled at 05.12 hours on 29th December 2003. The court heard evidence from the author of the record, Mr. Dougal, who was a demonstrably truthful and reliable witness.

[4] Thereafter, the Plaintiff attended, and was treated at, a succession of three hospitals. The records of these establishments contain a succession of entries phrased in words such as "*slipped on ice*" or closely equivalent terminology. It is unnecessary to dilate on this matter. Arguably the most important of these records is the one which was first compiled, when the Plaintiff attended the Craigavon Area Hospital. According to this record, the time of her attendance was 06.16 hours and the terms of the record are as follows:

"*Slipped on ice 4.45am – leg went under her*".

On behalf of the Defendant, it was highlighted that the Plaintiff first gave an account more consistent with the case which she makes long after the event, when she was initially examined by Mr. Laverick FRCS, a consultant orthopaedic surgeon who was compiling a litigation report, on 11th August 2006, whose report records this history:

> "*She told me that she was coming out of a friend's house and she caught her foot in a defect in the road causing her to fall. I note that her medical records indicate a history of having slipped on ice but she confirmed with me that this was not the case*".

[5] All of the witnesses the Plaintiff, Miss Mallon, Miss Toal (the Plaintiff's niece) and Mr. Dougal were agreed that the accident occurred on a cold night. However, they testified unanimously that ground conditions were not frosty or icy. This evidence must be juxtaposed with that which was given by Mr. Wylie, a senior representative of the Met Office (as it is now known). He testified, by reference to meteorological records, that between midday on 28th and midday on 29th December 2003 there were wintry weather conditions in the general area of south Armagh. Elaborating, he explained that after dusk on 28th December 2003, there were icy and frosty surfaces in this area. According to him, untreated, damp surfaces would have been treacherous. He opined that the most likely ground contamination during the night in question was hoar frost. During the afternoon of 28th December 2003, there was a good drying wind, which would have evaporated much surface water. However, water lying in a depression would have been less likely to evaporate, transforming to ice during the night in question. This would be consistent with the forecast of "*icy patches*" which, the witness explained, connotes sporadic, isolated small quantities of ice.

[6] The Plaintiff's evidence was that when she walked off the footpath in question, stepping down on to the surface of the car parking bay, her leg "*sort of twisted … gave way underneath*" and that her foot "*… seemed to have gone into something and got caught*". Unsurprisingly, the Plaintiff did not attempt to describe the condition or contours of the surface in question. She was clearly in extreme pain, a fact confirmed by other witnesses. In cross-examination, she further testified that her leg "*… went in and sort of went over … sort of twisted over … twisted and went under me …* ". More direct evidence about the condition of the surface at the accident locus was given by the Plaintiff's niece and Miss Mallon, both of whom returned to and examined the location the following morning. In due course, photographs were taken, on 20th February 2004. These depict a demonstrably irregular, deteriorating and generally uneven bitmac surface.

[7] With reference to the first main issue in the action, I make the following findings, on the balance of probabilities:

(a) The Plaintiff's fall occurred and her injuries were sustained in the manner alleged by her.

(b) The Plaintiff's fall occurred at the location alleged by her.

(c) The cause of the Plaintiff's fall and resulting injuries was the depression in the bitmac surface identified in the evidence and the photographs.

(d) There was an accumulation of some ice inside the depression.

(e) When the ambulance personnel attended, a history was given by or on behalf of the Plaintiff which identified ice as a factor in her fall.

(f) A similar history was given by or on behalf of the Plaintiff on subsequent occasions in the various medical treatment settings in which she found herself.

(g) Ground conditions in the general area of the accident locus were frosty, though not very obviously so, on the night of the Plaintiff's accident.

I reject the case made by the Defendant that the Plaintiff simply slipped on a level surface contaminated by ice. I accept the unanimous evidence of the Plaintiff, Miss Mallon, Miss Toal and Mr. Dougal that ground conditions were not icy at or in the vicinity of the accident locus. I base my findings about the presence of a quantity of ice inside the offending depression on the evidence of Mr. Wylie: see paragraph [5] *supra*.

[8] Turning to the second main issue, evidence was given on behalf of the Defendant about its inspections policy and practice relating to the region in question. In short, this area was the subject of inspections at intervals of four months. Thus it belonged to the fourth (and lowest) of the Defendant's inspection categories. The guideline, or threshold, for repairs is a depth of 20 mm. In the Defendant's policy terms, this (but nothing less) constitutes what has become popularly known as an "actionable defect", in this sphere of litigation. At this particular location, the frequency of inspections is dictated by the size of the housing estate (45 houses) and the vehicle intensity (less than 1,500 vehicles per day). The evidence also highlighted the factor of limited manpower and economic resources. Further, there was evidence that there had been no pre-accident complaints about the condition of the relevant car parking bay.

[9] The Defendant's evidence further established that whereas the surface of the adjoining carriageway was bitumen macadam (i.e. bitmac) plus a "slurry" seal, the car parking bay was surfaced simply in bitmac, with no accompanying seal. It was accepted by the Defendant's witnesses that the carriageway had a better quality finish. This appears anomalous, given that it was common case that a car parking bay of this kind is particularly vulnerable to deterioration, having regard to the action and movements of arriving, parking and departing vehicles. It was further accepted that the inspection policy is inflexible, to the extent that a 19 mm defect would not be noted and, furthermore, anticipatory (or prophylactic) repairs would not be carried out under any circumstances. Thus, if it were obvious to the inspector that a particular surface was about to deteriorate beyond the 20 mm threshold in the very near future, between inspections, this would not precipitate any remedial work. It was emphasized that the Defendant's inspectors had no discretion, in this respect. The Defendant's main witness also agreed that, as depicted in the photographic evidence [photograph No. 6 in particular], the car parking bay in question was "*littered with potholes generally, a rough deteriorating surface*". Finally, the Defendant's evidence was to the effect that during three successive pre-accident inspections, conducted during the months of March, July and November 2003, no "actionable defect" had been noted at the accident locus.

[10] With regard to the second main issue canvassed during the trial, I make the following further findings, on the balance of probabilities:

(a) The accident locus was inspected at intervals of four months.

(b) The last pre-accident inspections were conducted in March, July and November 2003.

(c) No "actionable defect" at the accident locus had been noted during any of these inspections.

(d) The offending depression was, as a matter of probability, of a depth of at least 20 mm when the last pre-accident inspection was carried out, on 7th November 2003. It should, therefore, have been noted and duly remedied. It follows that this inspection was not carried out with due care.

(e) As a matter of probability, this depression had deteriorated further during the period of almost eight weeks which elapsed between the inspection date and the accident date.

(f) When the first post-accident routine inspection was conducted, in March 2004, the offending depression had deteriorated further, to the extent that it had a measured depth of 55 mm.

(g) On 29th December 2003, the date of the Plaintiff's accident, the offending depression had a depth in the range of 20-55 mm.

[11] As regards findings (d), (e), (f) and (g) the Defendant's evidence effectively left the court with a choice. The Defendant's main witness postulated two possible explanations for the offending depression. The first was that it was the product of gradual deterioration, spanning an unspecified period of some months. The second was that it had occurred spontaneously, "overnight" in the witness's words. The witness, Mr. McGuigan, a well qualified consulting engineer, did not espouse any of these explanations in preference to the other. When questioned about this matter, I formed the impression that he was disposed to recognise the first of the two proffered explanations as more probably correct, even if he did not unequivocally acknowledge this. Taking into account the engineering and photographic evidence on both sides, I readily find that gradual deterioration is more likely than sudden breakdown. Properly analysed, the evidence adduced by the Defendant invited the court to find that whereas the offending defect was noted to have a depth of some 55 mm during the March 2004 inspection, when last inspected in November 2003 it was either non-existent or had a depth of less than 20 mm. Applying the balance of probabilities standard, I reject this as implausible in the circumstances.

[12] The next question to be addressed is whether the findings rehearsed above give rise to the conclusion that the Defendant was in breach of its statutory duty, imposed by Article 8(1) of the 1993 Order. It is clear from Article 8, considered as a whole, that the duty imposed on the Defendant is not absolute. Rather, it is akin to the familiar duty of care embedded in the tort of negligence. In every case, the question for the court will be, in essence, whether the Defendant has taken reasonable steps to maintain the surface in question in a reasonably safe condition, having regard to the particular context and circumstances. In this respect, the statutory adjective is "*dangerous*". In determining this question, the court will normally have to consider evidence relating to 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 and the characteristics and usages of the area in question.

[13] In ***McArdle –v- Department for Regional Development*** [2005] NIQB 13, Higgins J suggested the following approach in cases of this kind:

> "[8] *It is well settled law that in any action against the highway authority for compensation for failure to maintain the highway, the Plaintiff must prove that –*
>
> *(a) 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;*

> *(b) the dangerous condition was created by the failure to maintain or repair the highway;*
>
> *(c) the injury or damage resulted from such a failure …*
>
> [9] *… The court must have regard to the particular highway in question, its location, the particular part of the highway alleged to be dangerous and the user of the highway by pedestrians.*"

Thus, as the learned judge proceeded to observe, a contrast is to be made between a busy city centre pedestrian route and, for example, a remote rural thoroughfare.

[14] It is equally well established that the Defendant's liability in cases of this *genre* is not determined by the simple application of the well established barometer of reasonable foresight of injury. Properly analysed, the rationale for this must be the statutory adjective "*dangerous*", as noted in paragraph [12] above. This issue was addressed by the English Court of Appeal in ***Mills –v- Barnsley Metropolitan Borough Council*** [unreported, 7th February 1992], where Steyn LJ stated:

> "*In one sense, it is reasonably foreseeable that any defect in the highway, however slight, may cause an injury. But that is not the test of what is meant by 'dangerous' in this context.* ***It must be the sort of danger which an authority may reasonably be expected to guard against.*** *I do not consider that it would be right to say that a depression of less than one inch will never be dangerous but one above will always be dangerous. Such mechanical jurisprudence is not to be encouraged. All that one can say is that the test of dangerousness is one of reasonable foresight of harm to users of the highway and that each case will turn on its own facts*".

[Emphasis added].

In the same case, Dillon LJ added:

> "*The liability is not to ensure a bowling green which is 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. Obviously, in theory any irregularity, any hollow or any protrusion may cause danger, but that is not the standard that is required.*"

This was one of several English decisions cited with approval by the Northern Ireland Court of Appeal in ***Frazer –v- Department of the Environment*** [1993] 8 NIJB 22, at pp. 29-37 especially. Delivering the judgment of the court, Sheil J highlighted the overarching test viz. whether the surface in question was "*… dangerous to*

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" (at p. 39).

[15] In determining whether the Defendant was guilty of a breach of its statutory duty in the present case, I take into account particularly the following considerations:

(a) The adjoining carriageway had a better quality finish than the car parking bay.

(b) However, the car parking bay was more vulnerable to deterioration.

(c) Based on the engineering evidence and applying good sense and normal experience, rapid deterioration was more likely to occur during the winter season.

(d) The car parking bay merges with a pedestrian footway and is designed to be used by pedestrians.

(e) The footway seems to be maintained in a better condition than the car parking bay.

(f) There is a sudden transition from the footway to the car parking bay.

(g) The photographic evidence demonstrates that the car parking bay was in a generally poor and neglected condition.

Having regard to the findings which I have rehearsed in paragraph [10] above, and taking into account the aforementioned factors, I conclude that the surface on which the Plaintiff fell was dangerous to 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. It follows that the Defendant was in breach of its statutory duty and I hold that such breach was the sole cause of the Plaintiff's fall and resulting injuries. My finding that there was an accumulation of ice within the depression cannot alter this conclusion. The depression and the ice are inseparable elements, in the particular circumstances, and they combined to constitute a single cause in the occurrence of the Plaintiff's fall and resulting injuries.

[16] As noted in paragraph [2] above, the court was not invited to make any finding of contributory negligence. This does not of course, bind the court. However, as already observed, I consider that this was an appropriate concession in the circumstances. I have recently had occasion to reflect on the legal principles of contributory negligence, in ***Woods –v- Police Service for Northern Ireland*** [2009] NIQB 35, paragraphs [35] – [39], to which I refer. Having regard particularly to the lighting conditions, the topography generally, the colours of the various surfaces in question, the prevailing weather conditions and the time of the occurrence, I

conclude without hesitation that there was no contributory negligence on the part of the Plaintiff.

[17] Finally, I would make the observation that the unremitting inflexibility of the Defendant's categorisation and inspection policies were striking features of this trial and are matters upon which the Defendant may wish to reflect. This has previously attracted adverse judicial comment: see ***Keenan –v- Department of the Environment*** [1995] NI 343 (at p. 349, per Girvan J). Shortly afterwards, in ***McClenaghan –v- Department of the Environment*** [unreported, 28th February 1996], the same judge observed that "*the rigid and unthinking application of such a policy is open to serious criticism …*", for the reasons which his Lordship duly elaborated. Arguably the greatest anomaly which the policy generates is that which Girvan J framed in the following terms:

> "*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*".

It seems to me that the circumstance highlighted in paragraph [9] above that "an actionable defect waiting to happen" will similarly not be recorded (and, hence, will be unremedied) is equally anomalous. As the outcome of the present action demonstrates, such anomalies can potentially result in large awards of compensation to innocent pedestrians.

[18] Any further observation would be inappropriate, given the limited information available to the court about the various facts and factors bearing on these matters of policy and the truism that the formulation of policies is a matter for policymakers rather than courts.

Damages

[19] I have delivered a separate judgment holding that the Plaintiff is entitled to damages of £85,000, plus costs.