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Judgment: approved by the Court for handing down | *Delivered:* **10.01.2003**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

RHONDA MADDEN, A MINOR BY PAUL MADDEN, HER FATHER AND NEXT FRIEND

Appellant

and

DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND

Respondent

Before: Carswell LCJ, Nicholson LJ and Coghlin J

NICHOLSON LJ

[1] This appeal raises the question: to whom does a road authority owe a duty of care for non-feasance under Article 8 of the Roads (NI) Order 1993 (other than a pedestrian on foot) and if so, what is the nature and extent of that duty?

[2] Before the Roads (Liability of Road Authorities for Neglect) (Northern Ireland) 1966 Act came into force a road authority was not liable for non-feasance.

[3] The Act of 1966 provided by section 1(1) that any rule of law which operated to exempt a road authority from liability for non-repair of roads was thereby abrogated. Sub-section 1(2) provided a defence to an action in respect of damage resulting from their failure to maintain a road maintainable by them. For the purposes of a defence under sub-section (2) the court was required in particular to have regard to a number of matters set out in sub-section (3).

[4] The Roads (Northern Ireland) Order 1980 repealed the 1966 Act. It provided by Article 2(2) definitions of "carriageway", "footway" and "road". "Road" was defined as meaning a public road, that is to say, a road which is maintainable by the Department [the Department of the Environment], and included:–

(a) a road over which the public have a right of way on foot only, not being a footway;

(b) any part of a road.

"Footway" was defined as meaning a way comprised in a road which also comprises a carriageway, being a way over which the public have a right of way on foot only. Article 8(1) enacted that the Department should be under a duty to maintain all roads. Article 8(2) provided a similar defence to an action against the Department in respect of damage resulting from its failure to maintain a road as was provided by section 1(2) of the 1966 Act. Article 8(3) required the court to have regard in particular to a number of matters similar to the matters referred to in section 1(3) of the 1966 Act. In McKernan v McGeown and DOE [1983] NI 167 at p. 172 Gibson LJ stated that the nature and extent of the liability under the 1966 Act and the 1980 Order were the same.

[5] The Roads (Northern Ireland) Order 1993 repealed the 1980 Order but re-enacted by Article 2(2) the definitions of "road" and "footway". It also re-enacted by Article 8 the provisions of Article 8 of the 1980 Order.

[6] It was common case in this appeal that the respondent had failed to maintain the footway on which the accident occurred so as to be reasonably safe for members of the public on foot and that the defences provided by Article 8(2) and 8(3) were not available to it, if it owed a duty of reasonable care to the plaintiff.

[7] The argument on behalf of the respondent was that it owed no duty of care to any user of the footway other than a member of the public on foot, having regard to the definition of "footway" in Article 2(2).

[8] The court was reminded by Mr Morgan QC on behalf of the respondent that it is material to consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in the interests of a particular class of persons: see Groves v Wimborne (Lord) [1898] 2 QB 402 at 407. He contended that on a footway a duty was owed only to those members of the public who were on foot. He referred to Rider v Rider [1973] 1 QB 505 at 514A and the passage in the judgment of Sachs LJ: "The question which has been particularly canvassed in this court, as it was at first instance, is in effect to whom does the highway authority's duty extend; to whom must the danger be shown to be foreseeable?" The main burden of submissions in that case was that on the evidence a sufficiently careful driver would not have been put at risk by the state of the lane. The duty, it was argued, only extended to such users, and, accordingly, there had been no

breach of the highway authority's duty. This argument was rejected by Sachs LJ but he did say at 514E:

> "Having considered the authorities cited to Stirling J and in this court, it is in my judgment clear that the corporation's statutory duty … is reasonably to maintain and repair the highway so that it is free of danger to all users who use that highway in the way normally to be expected of them – taking into account, of course, the traffic reasonably to be expected on the particular highway."

This leaves open the question whether a person rollerblading on the footway is using it in a way normally to be expected. But it does not appear to me that it necessarily assists the respondent in its argument that a duty is owed only to members of the public on foot.

[9] However the decision of this court in Ingram v DOE (Unreported: 6 September 1993) does support the submission of Mr Morgan. McCollum LJ who gave the judgment of the court stated:-

> "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."

It appears that the part of the footpath on which the accident occurred in that case was not reasonably safe for pedestrians on foot and that, therefore, the court held that no duty was owed other than to pedestrians on foot.

[10] Reliance was also placed on a passage in Sauvain's Highway Law (2nd Edition) at 1-20 which reads:-

> "Thus a footway, being only part of the carriageway highway, must be distinguished from `a footpath' which is an independent highway in its own right. Secondly, once a pavement or path is identified as a statutory `footpath', there is an immediate limitation on the rights of vehicles to use the full width of the highway (since the right over the footway is `on foot only') but there is no corresponding limitation on the pedestrian who strays onto the main carriageway."

At 5.20 it is stated:

> "Sachs LJ expressly excluded drunken and reckless drivers from the normal run of drivers. Persons driving motor vehicles on bridgeways and footpaths, and cyclists riding on footpaths might also qualify for exclusion from the ambit of the duty."

[11] Mr D P Fee QC on behalf of the appellant pointed out the many anomalies which arise from such a construction of the statute. The person on horseback, the cyclist, the user of a wheelchair, the baby on a tricycle, the user of a scooter, a person on crutches who encounters a defect which would cause a pedestrian on foot to be injured would be denied a remedy, whereas Article 8 could fairly be construed, he contended, as imposing a duty on the respondent when it was reasonably foreseeable that use of the footway would be made by such a person. The use of rollerboards (and skateboards) by youngsters was commonplace and the standard of care demanded of the respondent was not a higher standard than that which was required for pedestrians.

[12] The decision seems to me to turn on the construction of Articles 2 and 8 of the Order. The latter Article provides:-

> "8.-(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 the 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; or

(b) that the injury or damage –

(i) resulted from works (other than works by or on behalf of the Department) carried out on or under that part of the road to which the action relates; and

(ii) resulted from an event which occurred before the completion of the re-instatement or making of that part of the road in accordance with any relevant requirement.

(3) For the purposes of a defence under paragraph (2) 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 the 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 expected 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 that he had carried out the instructions."

[13] If Article 8(1) stood alone, it would be open to argument that it did not give rise to a cause of action, if there was a breach. Article 8(2) makes it clear that an action can be brought by a person in respect of injury or damage resulting from failure to maintain. It does not place expressly any restriction on the persons who can sue, unless it can be argued that a person who is not "traffic" is excluded. It seems to me that if the road is dangerous to traffic, a person who is injured is entitled to sue but in any event I regard a rollerblader as "traffic". No definition of "traffic" is provided but Schedule 1 sets out "Classes of Traffic for Purposes of Special Roads". These include vehicles drawn or propelled by pedestrians, pedal-cycles, animals ridden, led or driven, pedestrians, perambulators, pushchairs and other forms of baby carriages) and dogs held on a lead and invalid carriages.

[14] That there is no reference to skateboards or rollerskates or rollerboards does not mean that a person using them is not "traffic" if he is using them to travel on the road. In my view the word "traffic" is wide enough to cover such a person. But it does seem to me that the respondent would have a good defence under Article 8(2) to an action brought by such a person if the footway was only dangerous to such traffic and was not dangerous to pedestrians on foot.

[15] Article 8(3) strengthens the argument that any individual who is injured by a failure to maintain a road is entitled to bring an action against the respondent, although, of course, he may not succeed. Article 8(3)(d) requires the court to have regard to "whether the Department knew, or could reasonably have been expected to know that the condition of the part of the road to which the road relates was likely to cause danger to users of the road." The words "users of the road" are wide enough on one view to include any person whom the road authority could reasonable foresee as likely to use the road, whether as of right or otherwise. But it may or may not

be the case that a road authority could reasonably foresee a roller-blader as the user of a particular footway.

[16] The decision in Wentworth v Wiltshire CC [1993] 2 All ER 256 to which Mr Fee drew our attention did not address directly the point at issue in this case. But insofar as the Court of Appeal did not seek to draw a distinction between different users of the highway if they could prove that they had suffered physical injury to person or property while using the highway when it was in a dangerous condition due to want of repair or maintenance, it lends support to the view that drunken and reckless drivers are within the ambit of the duty.

[17] However, the question arises as to whether the road authority could sue a person using the footway as a trespasser and, if so, whether no duty would be owed to such a person for non-feasance or only the duty owed to a trespasser. The right of the public in respect of a road is limited to the use of it for the purpose of passing and repassing and for such other reasonable purposes as it is usual to use the road or highway. If a person used it for any other purpose he would be a trespasser: see Clerk and Lindsell on Torts, 18th ed. 18-46.

> "On a highway I may stand still for a reasonably short time, but I must not put my bed upon the highway and permanently occupy a portion of it. I may stoop to tie up my shoelace, but I may not occupy a pitch and invite people to come upon it and have their hair cut. I may let my van stand still long enough to deliver and load goods, but I must not turn my van into a permanent stall." Iveagh v Martin [1961] 1 QB 232 at 273 per Paull J.

The rights of the public in respect of a highway have undergone a significant extension as a result of the decision in DPP v Jones [1999] 2 AC 240. But these rights appear to be irrelevant to the instant case.

[18] However it seems to me that members of the public are entitled to use a road for purposes of recreation or as a playground, so long as they do not cause public nuisance or obstruct the right to pass and repass and are users of the road under Article 8(2), provided that the road authority can reasonably foresee such user.

[19] It is a defence to an action for trespass to show that the defendant is on the land with the leave and licence (express or implied) of the occupier. This must apply to roads as it does to other premises. It must be a question of fact for the trial judge whether the user of a footway (other than on foot) is a trespasser or a licensee. Thus in my view it is almost inevitable that the user

of a wheelchair, a baby on a tricycle and a person on crutches would not be a trespasser on the footway. A person on horseback, a cyclist, the user of a scooter may or may not be a trespasser; a motorist, a motor cyclist, the user of a motor scooter is likely to be a trespasser except in an emergency. In an emergency an implied licence might well arise.

[20] In my opinion if a person is not a pedestrian on foot but is a licensee, the road authority owes the same duty to which Article 8(2) may provide a defence.

[21] If a person is a trespasser, then at the very least the road authority owes on the footway a duty in respect of any risk of his suffering injury on the footway by reason of any danger due to the state of the footway or to things done or omitted to be done on it if –

(a) it is aware of the danger or has reasonable grounds to believe that it exists;

(b) it knows or has reasonable grounds to believe that the trespasser is in the vicinity of the danger concerned or that he may come into the vicinity of the danger, and

(c) the risk is one against which, in all the circumstances of the case, it may reasonably be expected to offer some protection to the trespasser. The duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury or damage by reason of the danger concerned.

[22] This is the duty which the Occupiers Liability (NI) Order 1987 imposed, as owed to a trespasser. It expressly provided that it did not apply to roads.

[23] Having read the judgment of Coghlin J in draft I am prepared to accept that it is unnecessary to remit to Sheil J the decision as to whether the appellant was a licensee and have revised my judgment accordingly. Coghlin J has more experience than I have of the use of skateboards. I have minor reservations as to whether this ought to be expected on the pavements of main roads in a town or city but decline to refer the issue back to the trial judge as to whether the appellant was a licensee or a trespasser of the reasons set out at [24] and [25].

[24] I am not prepared to dissent from the opinion of the Lord Chief Justice (which I have read in draft) that the abolition of liability for non-feasance under Section 1(1) of the 1966 Act, when combined with the wording of Section 1(2) conferred a right of action to all persons, lawfully or unlawfully on a footway on which pedestrians only were stated to have a right of way.

His opinion has the merit of simplicity and of eliminating the distinction between trespassers and other persons using the footway, which, if he is right, the legislature in England and Wales must have intended to abolish in 1959 when the Highways Act 1959 was passed. The comparable legislation in Northern Ireland in 1966 was carried from the English legislation. I have had some reservations as to whether the legislature in 1959 was so enlightened as to intend to give a cause of action to trespassers, other than as a matter of "common humanity".

[25] Be that as it may, I think that it would be inappropriate for me to dissent, having regard to the language of Article 8, the clarity of the reasoning of the Lord Chief Justice and the support of Coghlin J. I have not found in the text books, other than the tentative view of Souvain on Highways (2nd Edition) at 5.20 any reservation which would cast doubt on his opinion, nor have I found any case in respect of misfeasance or non-feasance on a highway or road which treats a trespasser in a different way from other users of the highway or road. The defences of volenti non fit injuria and contributory negligence remain available to the road authority.

[26] Accordingly I respectfully agree with the judgment of the Lord Chief Justice.