**Neutral Citation no. [2007] NIQB 47** | *Ref:* **MORF5870**

*Judgment: approved by the Court for handing down* | *Delivered:* **15/06/07**

*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

_____

**QUEEN'S BENCH DIVISION**

_____

**BETWEEN:**

**MARGARET MCSHERRY**

**Plaintiff;**

**-and-**

**DEPARTMENT OF REGIONAL DEVELOPMENT**

**Defendant.**

_____

**MORGAN J**

[1] The plaintiff claims damages for personal injuries sustained by her as a result of a fall on Frances Street Newry on 13 July 2001.

[2] On that day the plaintiff was shopping with her husband, daughter and granddaughter in Newry. She had been staying in Omeath on holiday. The party had reached Frances Street which is a commercial shopping street in Newry with the Buttercrane Centre on one side of the road and commercial premises including a hairdressers and public house on the other side of the road on which the plaintiff was walking. As the plaintiff walked along she suddenly fell and described how her arm went out in front of her. When she sat up she saw that her toe was bleeding in her sandals. Her left elbow was very painful and it was established that she had sustained a fracture of the left radial head of the elbow. Her knees, toe and back were sore. She identified the site of her fall as a concrete water channel running across the pavement which was sitting proud of the adjoining asphalt.

[3] In cross-examination she indicated that she had no recollection of telling the hospital what caused her fall when she was admitted shortly afterwards. Her husband had taken photographs on 14 July 2001. She said that her foot had definitely caught on something pointy. It was put to her that her then solicitor had suggested that she had tripped in the dipped portion of

the curved water channel during a conversation on 8 January 2003 but she denied that she had ever made such a case.

[4] The plaintiff's daughter described how she had been walking beside her mother on this afternoon. She became aware that her mother had fallen beside her. She was crying and in agony and it was clear that her arm was injured. She said that the water channel was not level with the tarmac but sat up a little. In cross-examination she did not remember if she had gone with her father to take photographs. She agreed that she may not have mentioned the raised the area to her father. She thought there had been some discussion about what had caused her mother to fall but she could not now remember it.

[5] Mr McGill is a consultant engineer who was retained by the plaintiff. He inspected the locus are 11 February 2005. He found an average difference in level between the water channel and the bitmac of 6 mm. He found a maximum of 9 mm towards the centre of the pavement. He accepted, however, that this area had been resurfaced towards the end of 2003. He felt it would be safer to have the bitmac above the level of the water channel but he accepted that a resurfacing of the water channel which left an edge of up to 6 mm above the bitmac could not be criticised. He referred to the Specification for the Reinstatement of Openings in Roads published by the Roads Service in 1998 which provided for a tolerance of no more than 6 mm to contend that anything above that tolerance represented a hazard. He pointed out that the contractual tolerance for the resurfacing in late 2003 was 3 mm and that the job did not appear to comply with the specification.

[6] It was put to him that the pavement had been resurfaced in 1986. He accepted that if that was so one could expect some deterioration to occur in the period between 1986 and 2001. He accepted that there may be some settlement but found it difficult to quantify the extent of such settlement. He found it unusual that settlement should occur uniformly across the concrete channel. It was suggested to him that the contract documents indicated a contractual tolerance of 10 mm for the work in 1986. He said that he knew that DRD put in variable tolerances but could not explain why that should be so in this case.

[7] Mr Quinn is a road service engineering assistant. He received the photographs taken by the plaintiff's husband and eventually contacted the solicitor then acting for the plaintiff on 8 January 2003. He said that the solicitor explained that the design of the channel was what had caused the plaintiff's fall. He says that the solicitor made the point that the curvature of the channel created a difference in level. Mr Quinn visited the scene on the day of that telephone conversation and established that the channel had a depth of 13 mm which was in accordance with the common design used on roads since 1979. He noted that there was an edge between the top of the channel and the bitmac of 6 mm. He attributed this to a rounding down of

the bitmac as a result of settlement since the work was completed in 1986. He said that any footpath in use will get slight settlement. The footpath had been resurfaced in the 2003. Mr McGill's photographs show the new layout. It was his view that the water channel when laid in 1986 was probably done to a tolerance of 3 mm.

[8] He could not explain why there should have been a presenting edge of 9 mm in 2005. He accepted that this was a busy commercial area with a 4 weekly inspection routine. He said Hill Street and Monaghan Street in Newry were busier than Frances Street but that Frances Street was the third busiest street in the commercial heart of the city. He accepted that his measurement of 6 mm might not be entirely accurate and that the presenting edge could be as high 7 or 8 mm.

[9] The final witness was Mrs Noble, a chartered engineer employed by roads service. She is the section engineer for the Newry area. She said that the drawings for the refurbishment works in the 1980s were dated 1985 and the work was probably carried out in 1986. She said that the drawings suggested a tolerance of 10 mm but she could not explain why such a tolerance would have been permitted in relation to that contract although from time to time a different tolerance was permitted to reflect particular circumstances. The recommended tolerance at that time was 3 mm. She explained that settlement could occur over time. She said that the fact that this was a busy footway, that commercial premises adjoined it and that delivery vehicles were likely to have come onto the pavement would all have contributed to settlement over the 15 years between the date of the resurfacing works and the date of the plaintiff's fall. In cross-examination she said that she inferred that settlement had occurred since 1986. She accepted that the drawings in 1985 suggested a tolerance of 10 mm and would have permitted an edge of 6 to 8 mm across the channel along the footway. She accepted that this was a busy pedestrian period. She said that a variance of 6 to 8 mm was a feature likely to be found in a footway and was not in her opinion a hazard.

[10] I accept that the plaintiff fell when she tripped on the edge of the concrete water channel on the afternoon of 13 July 2001. Mr Quinn was prepared to accept that the exposed edge might be as high as 8 mm and I proceed on the basis that the edge was at that height on the day in question. I accept that the street had been resurfaced in 1986 and that some settlement had probably occurred. The photographs suggest that the settlement had become most pronounced towards the centre of the footpath where one would expect most pedestrian traffic to occur. It is not possible to precisely determine the extent of the settlement but it seems to me likely that the presenting edge when the work was completed was no greater than 6 mm. I accept that this is a busy commercial area in a thriving city centre.

[11] The defendant is the Roads authority responsible for the maintenance of the highway and owes a duty in nuisance to the plaintiff to keep the highway in repair. The duty in nuisance applies only to acts of repair or other acts in relation to the highway improperly performed (see Griffiths v Liverpool Corporation [1967] 1 QB 374). In order to establish liability in nuisance the plaintiff must prove that the highway was in such a condition as a result of those acts that it was dangerous to traffic and 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. The liability is not to ensure a bowling green which is entirely free from all irregularities or changes in level at all. The question is whether a reasonable person would regard it as presenting a real source danger. In one sense, it is reasonably foreseeable that any defect on the highway, however slight, may cause 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 (see Mills v Barnsley Metropolitan Council unreported 7 February 1992 and James v Preseli Pembrokeshire District Council unreported 27 October 1992 approved in Frazer v DOE 1993 NIJB 8).

[12] I have concluded that it is probable that the presenting edge as a result of the work carried out in 1986 was 6 mms or less. Neither engineer contends that reinstatement causing such an edge is dangerous in the sense described in paragraph 10 above and I agree. The plaintiff does not make a case in relation to nonfeasance and I do not have to consider whether a tripping edge of 8 mm would have given rise to a dangerous hazard at this location although I tend to the view that it would not since such variances in pavements which have been laid for some time are to be expected. For the reasons set out above I must dismiss the plaintiff's claim.