Neutral Citation: [2017] NIQB 4 | *Ref:* **KEE10148**

Judgment: approved by the Court for handing down | *Delivered:* **13/01/2017**
*(subject to editorial corrections)**

2014 No: 62820

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between

PATRICIA ANNE McMULLAN

Plaintiff

and

THE DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant

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KEEGAN J

Introduction

[1] The plaintiff was born on 16 September 1972 and so she is now 44 years of age. She is a married woman with two children. This case relates to an incident which occurred on 9 September 2011. That was a Friday and at around 2:30 or 3:00pm the plaintiff says that she tripped on a public country road known as the Motalee Road in Magherafelt.

[2] The plaintiff states that she was caused to trip by reason of a vertical exposed edge on the road at what has been described as a pothole. As a result of this the plaintiff states that she suffered an injury to her left wrist. Her wrist was swollen and bruised. She experienced pain in her wrist at the time when she fell. Some days later she attended at the Mid-Ulster Hospital A&E Department. X-rays were performed and a splint applied. The plaintiff's case is that the pain did not subside and she then attended at the Causeway Hospital a number of days later. Scaphoid fractures were suspected and a cast was applied for a period of four weeks. The plaintiff suffered ongoing pain and restriction. She attended at physiotherapy which did not assist her. The plaintiff suffered ongoing pain and stiffness to her wrist along with reduced grip strength.

[3] The prognosis remains guarded and surgery is unlikely to assist. The plaintiff requires the ongoing use of analgesic medication to assist with the pain in her wrist. The plaintiff also suffers from depression and panic attacks. As a result of her medical issues she has been unable to work since 16 August 2012. The plaintiff has congenital lymphedema which affects mobility in her legs. It was accepted that this health issue is responsible for the plaintiff's ongoing loss as a result of not being able to work. The plaintiff therefore claimed general damages for the injury to her wrist and for the psychiatric effects of that. She made a claim in relation to loss of overtime earnings for the period 9 September 2011-16 August 2012 of some £4,863.15. She claimed £8,126.59 recoupment claim for the period 9 September 2011-16 August 2012. She also claimed a loss of earnings of £2,437.20.

[4] The medical evidence was agreed in this case. On behalf of the plaintiff reports were filed from Dr Loughrey, consultant psychiatrist. A report was also filed from Mr McHenry, consultant trauma and orthopaedic surgeon. Finally, on behalf of the plaintiff Mr Barry Craig filed a report. Mr Craig is a consultant orthopaedic surgeon. On behalf of the defendant Mr Yeates, consultant orthopaedic surgeon, filed a report. Reports were also filed by Mr Brian Fleming, consultant psychiatrist.

[5] Miss Moran BL appeared on behalf of the plaintiff. Miss Best BL appeared on behalf of the defendant. I am grateful to both counsel for the economical and focused way they conducted this case and for their submissions in relation to the relevant legal principles.

Legal Context

[6] A determination in this case is guided by the provisions of the Roads (Northern Ireland) Order 1993. The defendant in this case contested liability firstly on the basis of the plaintiff's credibility. The argument was that the plaintiff had not sustained the injury in the way she said. Secondly, an argument was made by the defendant that it had discharged its legal duty under Article 8(1) of the Roads (Northern Ireland) Order 1993 ("the 1993 Order"). Articles 8(1) 8(2) and 8(3) of the 1993 Order where relevant provide as follows:

> "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 contributory negligence to prove –

(a) That the department had taken such care as in all the circumstances was reasonable required to secure that the part of the road to which the action relates was not dangerous for traffic.

(3) For the purpose 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 the 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, that warning notices of its condition has been displayed."

[7] Counsel referred me to a number of seminal cases in this area namely, Fraser v DOE [1993] 8 NIJB, McArdle v Department of Regional Development [2015] NIQB 13 and McKee v Department for Regional Development [2013] NIQB 94.

[8] From these authorities I draw the following principles:

(i) 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.

(ii) The dangerous condition was created by the failure to maintain or repair the highway.

(iii) The injury or damage resulted from such a failure.

(iv) It is accepted that economic factors do have a bearing on the department's duty - Fraser v DOE.

(v) Article 8 does not impose an absolute duty on the defendant. 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.

(vi) The danger must be of the type that the authority may reasonably be expected to guard against. The well-travelled authority of Mills v Barnsley Metropolitan Borough Council (Unreported 7 February 1992) clearly states that the liability is not to ensure bowling green standards.

(vii) Reference was made to the 20 millimetre criterion which has been explained in the case of McClenaghan v Department of Environment (Unreported 20 February 1996). This is of course a guide and must be taken as such and not applied in a rigid way given that differing conditions of individual roads and pavements will dictate whether or not a hazard is actionable.

[9] I have considered these legal principles in looking at the overall picture in this case. I then turn to the evidence.

The Evidence

[10] The plaintiff explained that she had been at her father's house on the Friday in question and that she had met her sister there. She said that she had begun walking with her sister for a number of weeks in an effort to lose weight. She said that the usual route was in a different area of Magherafelt and that it was about 2-3 miles round trip. On this particular day the plaintiff said that she decided to walk around a circuit near their father's house. The plaintiff gave evidence that she had not undertaken this walk in a couple of years. She said that the walk was along a country road where there were lorries and cars. She said that she was walking along chatting to her sister when she fell down and put her hands out to save herself. The plaintiff explained that there were no footpaths on the road. She said that she fell forward because her foot got caught in a pothole. The plaintiff explained that she continued to walk on. Her wrist was sore however she completed the walk. The plaintiff explained that she was wearing a tracksuit and trainers.

[11] The plaintiff stated that she did not seek treatment over the weekend as she thought her wrist was only sprained and would resolve but after she left her child to playschool on the Monday she decided to go to A&E to have the matter checked out. The plaintiff explained that the A&E Department said that her wrist was badly

swollen and she was to come back in 10 days. The plaintiff could not deal with the pain and went to a different hospital, the Causeway Hospital, the following Saturday. The plaintiff had been x-rayed at Magherafelt Hospital and she said that the Causeway Hospital used these x-rays as a basis for treatment. The nurse there thought that perhaps she had sustained a small fracture and a Plaster of Paris was applied. It transpired that a fracture was not noted when the plaintiff attended at the Fracture Clinic however the plaster was left on.

[12] The plaintiff then described that a solicitor had advised her to take photographs of the area and she says that she did so with her husband about a week or so after the accident. The plaintiff said that the Fracture Clinic at Coleraine thought that her wrist was fine but when the plaster was taken off her wrist remained painful. She was referred to physiotherapy but this did not particularly help her. The plaintiff described an ongoing effect in terms of not being able to play fully with her children or fully undertake household tasks. She referred to the fact that she needed considerable painkilling medication to live a normal life. The plaintiff also gave evidence that she thought her wrist injury had reactivated depression.

[13] The plaintiff was referred for an MRI scan but had a panic attack and so she could not undertake this intervention. She had a CT scan. The plaintiff said that this CT scan showed some widening of the scaphoid bone and further treatment was suggested. However, the medical professionals indicated that surgical intervention was not an option. The plaintiff stated that at this stage a prescribed painkiller did assist her and that she remains on that medication. The plaintiff stated that she has to take this medication up to three times a day and that her wrist is particularly painful in cold or wet weather. The plaintiff described that her wrist continues to have an effect on her day to day life.

[14] The plaintiff described her depression which was particularly problematic after her mother's death but she said that the wrist injury brought this back. The plaintiff referred to her reliance upon anti-depressant medication. The plaintiff stated that in September 2011 she was a home help helping the elderly and those needing palliative care. She said she had worked for 21 years in that employment. The plaintiff stated that her employment was terminated in August 2012 and she has not worked since. The plaintiff also explained that she was born with lymphedema in both legs which leads to severe swelling and she requires compression bandaging and stockings in relation to that. This is a significant disability which it was accepted is the cause of her ongoing inability to work. In cross-examination the plaintiff accepted that she could not say that overtime was either an obligation that her employer had to provide or that she took up on a regular basis. The plaintiff also accepted that she would have difficulties with walking now.

[15] The plaintiff stated that she did not have difficulties with walking at the time of the accident. However, Miss Best, during an effective cross examination, took the plaintiff through her application form for Disability Living Allowance (DLA) which

was made in March 2012. In that documentation the plaintiff said that her walking difficulties started in September 2011 and that was due to difficulties with lymphedema. In her report to DLA she referred to her legs giving way and the fact that she would trip 5 to 6 times a month. This application was for higher rate DLA and it is significant in my view that the plaintiff averred that all of these difficulties with mobility came about at the same time in September 2011 when she sustained the injury. The plaintiff accepted that the accident had not injured her legs in any way but rather her wrist. She said that it was simply co-incidental that the wrist injury was sustained in September 2011 at the same time when she was saying the difficulties with walking were so profound.

[16] The other area of cross-examination of the plaintiff which is significant relates to the A&E records in relation to her fall. The significant entries were from the first A&E records at the Mid-Ulster Hospital. In the records there is reference to the fact that the plaintiff simply slipped and fell. The first record refers to "home accident" and "fell on wet floor 5 days ago". When the plaintiff was asked about this she said she simply did not know why the record said that. The Causeway reports also refer to "slipped on wet floor."

[17] Mrs Avril, who is the sister of the plaintiff, gave evidence. She said that she was out walking with her sister on the day in question. She said that she did not actually see how her sister fell because she was walking and chatting at the same time. However, she said that she understood that the plaintiff's foot caught in a pothole and she knew that the plaintiff had a sore wrist and noticed that it was swollen as a result. Mrs Avril said that after the incident she got some frozen peas and painkillers for her sister.

[18] Mr McMullan, the plaintiff's husband, also gave evidence. He stated that about a week after the incident he took various measurements of the pothole. He referred me to the photographs that he said he took at the site of the incident. Mr McMullan accepted that his measuring tape was not flush to the ground in that it was at an angle or tilted. He pointed to the fact that the measurements seemed to be around the 20 millimetre mark for the area where the plaintiff allegedly fell. Mr McMullan and indeed his wife and his sister-in-law all confirmed that no complaints were made to the relevant authorities by them about the state of the road.

[19] Mr McKeown, civil engineer, gave evidence on behalf of the plaintiff. He referred to an inspection that he undertook on 23 April 2012. He referred to some photographs of the locus. It is clear from the photographs that the area where the plaintiff allegedly fell had changed in complexion in that the small pothole in which she allegedly tripped had merged into a larger pothole. This was accepted to be due to wear and tear on the road. This witness said that he measured the area as pointed out by the plaintiff and his measurement came to just about 21 millimetres. The witness accepted that this was very similar to Mr McMullan's measurement in that it was in and around 20/21 millimetres. Mr McKeown accepted that his measuring could not be truly flush either in that there might be some tilting involved. This

witness also referred to another pothole measurement in the same area of 24 millimetres. He also gave helpful evidence about the fact that weathering in relation to the road would depend on traffic and the season. It would be affected by frost. It would be greater in the winter than the summer. When the difference in measurement between his measurement and the department's measurement was put to Mr McKeown (the department's measurement being 10 millimetres) he said he could not understand that.

[20] At the conclusion of the plaintiff's case, I declined an application to dismiss the case. I then heard evidence from the defendants. The first witness for the defendant was a Mr Robin Cuddy, an engineer with Transport Northern Ireland from 2008. He gave evidence that he was a civil engineer. He described the area as a minor country road. He referred to the policy for inspections in this type of road as being every four months given that the volume of traffic was under 500 vehicles a day. In other words it was a low traffic country road. This witness referred to the fact that the road had been dressed in 2003 in accordance with policy. He said that there was spray bitumen binder put on top of dry stone. He said that this was a cost effective binding. There was a 10 year rolling programme so the road had been redressed in 2013. He said that surface dressing is susceptible to weather in that hot summers tend to strip off the surface of the bitumen binding. Further weathering can take place as a result of frost, water damage and traffic use. This witness referred to the fact that if the vertical depth of a defect on this type of road is below 20 millimetres that there is no obligation to deal with it as something to fix. He said this was due to budgetary issues and prioritisation of roads.

[21] Under cross-examination this witness was referred to the policy whereby even if the defect was between 20 and 50 millimetres, given the road conditions, it would not be looked at other than at the four monthly inspections. The witness referred in cross-examination to the fact that there was no footpath on this road. He said it was impossible to have footpaths on every road and that there would obviously be a higher footfall in cities and footways and that the department's responsibilities should be looked at accordingly. He said if there had been a footway this may have been a defect to be corrected.

[22] The defendant also called Mr Martin Bell, an inspector of 5 years standing, he again referred to the nature of this rural road and he referred to the fact that he undertook visual inspections. He referred to the fact that there were no defects noted on these inspections. This witness referred to the fact that there was a site inspection at which he attended with the plaintiff and a Mr King on 25 January 2012. The alleged defect was pointed out to him by the plaintiff. He measured it with a measuring block. The witness explained that the block is cut at 20 millimetres so that defects in that zone and above are clearly identifiable. He measured this alleged defect as 10 millimetres. He identified the area where the plaintiff pointed and his evidence as to locus was not contradicted. The witness confirmed that there was no complaint made about this road.

[23] This witness was cross-examined in impressive detail by Ms Moran in relation to his inspections. She carefully went through the inspections from January 2011, May 2011, September 2011 and January 2012. The witness said that no defects were recorded over 20 millimetres at any of these stages. The photographs taken by the plaintiff's engineers were put to this witness and in particular Ms Moran made the point that there was a 24 millimetre defect noted in April 2012 which should have been picked up.

[24] Finally, the defendant called Mr King, who is a maintenance supervisor of 15 years standing. He attended at the site inspection in January 2012 and he took photographs. This witness referred to the area that was pointed out by the plaintiff as amounting to a 10 millimetre vertical edge.

Submissions of the Parties

[25] Miss Best in her concise submissions said that there were two issues:

(i) Did the plaintiff come to grief as she described, and

(ii) If she did was the defendant liable or could the statutory defence be made out.

[26] Miss Best argued that the inspections were up to date. She said there was no argument about quality. She said that the qualifications of the inspectors had not been impugned. Miss Best stressed the nature and purpose of the surface in that this was a rural country road with low velocity traffic. She said that the issue was whether the road was dangerous for use and that required reasonable foresight. It did not need to be kept like a bowling green. She said if I were to decide that there had been a fall that does not automatically result in the conclusion that the road was in a dangerous condition. Miss Best said that the plaintiff was not a credible witness on the basis of the A&E records and her assertions to the DLA. If I did find that the plaintiff was a credible witness Miss Best said that the defendant should be able to avail of the statutory defence on the basis of the nature of this road and the various factors she outlined.

[27] Ms Moran accepted the points raised by Miss Best in terms of the two questions to be asked. She disputed the credibility issue and said that the plaintiff had an advantage in this case in that her husband and sister also gave supportive evidence. In relation to the second question Ms Moran said the burden was on the plaintiff to prove that the road was dangerous. She relied on Mr McKeown, her engineer, to say that the defect was in the region of 20 millimetres and above and so it was dangerous. Ms Moran accepted that that was not the end of the question in that the defendant can rely on the statutory defence. Ms Moran had no issue with the frequency of the inspections or the quality or purpose of the inspections or the qualifications of the inspectors. Ms Moran's central argument was that the inspections had not been reasonable because in the May 2012 inspection the defects

identified by her engineer were not picked up. In particular, Ms Moran placed emphasis on the pothole which was not part of the plaintiff's case but a separate pothole in the road measuring 24 millimetres. Ms Moran also referred to the fact that there was no footpath on this road but that it would be reasonably foreseeable that it would be used by pedestrians. Ms Moran accepted that the predominant use of the road was vehicular.

Conclusions

[28] I have to decide this case on the balance of probabilities having heard the evidence and considered the materials before me. I have decided that I should dismiss the plaintiff's claim for the following reasons.

[29] In my view, a valid point has been raised in this case regarding the plaintiff's credibility. There were significant issues raised in evidence as to how the plaintiff described this accident. I understand that the plaintiff has a serious congenital medical condition. She also appeared nervous in court. I wanted to give the plaintiff the benefit of the doubt in relation to matters but the evidence against her in relation to how this accident occurred was simply too strong. I say this for the following reasons. Firstly, the plaintiff could not give any explanation as to why the original A&E note said "home accident" and referred to "slipping on a wet floor 5 days ago". In my view this goes beyond a simple mistake. Ms Moran tried to argue that this was not fatal to the plaintiff's case. If this was the only evidence against the plaintiff I might have been more receptive to that argument. However, in addition to this significant issue there was also the issue of the DLA papers. These referred to the fact that in September 2011 the plaintiff effectively stated that she could not walk and that she was applying for higher rate DLA. Again the plaintiff could not explain how this would be and it does not make sense in the context of the plaintiff's evidence that she was walking 2 to 3 miles with her sister in and around the same time as she was averring that she could not walk very far.

[30] I acknowledge that the plaintiff's sister gave evidence and indeed her husband gave evidence. I have considered this very carefully but I simply cannot accept that the accident happened in the way the plaintiff said. I am persuaded, on the balance of probabilities, that the objective materials I have considered point to a different cause. That cause may be a slip on a wet floor as stated in the A&E records. It may also simply be that the plaintiff fell in some way due to weakness in her legs. I do not have any reason to believe that the plaintiff's injury has been exaggerated or made up. I simply cannot attribute it to the fall from tripping on the pothole. So having heard the evidence, I do not accept the accident happened in the way that the plaintiff says, on the balance of probabilities

[31] Even if I had determined that the plaintiff's evidence was credible in terms of how the accident occurred, I would not find for the plaintiff on the facts of this case. I am satisfied that the defendant has discharged the legal duty and properly invoked the statutory defence under the 1993 Order. Firstly, I am not convinced that this was

a defect over 20 millimetres. It seems to me, on its height, to have been on the cusp of 20 millimetres. I take into account the fact that the road had deteriorated significantly by the time the engineer had inspected. I consider that the plaintiff's husband's measurement may be skewed as a result of the tape measure being tilted. This may also apply to the plaintiff's engineer's evidence but to a lesser degree. The fact of the matter is that the plaintiff pointed out the area where she fell to the defendant's inspector in January 2012 and with the help of a block he measured that at 10 millimetres. In my view this defect was one that would change given the wear and tear of the road and at the time of this incident the most that can be said is that it was somewhere within the 10-20 millimetres band.

[32] A distinguishing feature in this case is that the plaintiff was walking on a country road. The predominant usage was vehicular traffic. In that context, I do not consider that the pothole presented an obvious hazard giving rise to a real risk of injury to pedestrians or was an actionable defect. In my view this is also a case where the defendant can rely upon the policy of maintaining country roads in a more incremental way than maintenance of a footpath where there would be regular pedestrian traffic.

[33] I cannot see any breach of the defendant's policy in that this was a country road with low traffic, so even if the defect was over 20 millimetres there would have been no obligation to correct it other than at inspections. I accept the evidence of the defendants in relation to the inspections. The point that Ms Moran made about the other defect not being picked up is a good one however I do not consider that this alone should result in the plaintiff succeeding in this case. That pothole was unrelated to where the alleged incident occurred. It was discovered long after the alleged incident. In my view, this one piece of discrete evidence does not completely undermine the other inspection evidence.

[34] So, even if the plaintiff had convinced me regarding causation, I am satisfied that the defendant has made out the statutory defence on the facts of this case.

[35] I therefore dismiss the plaintiff's case.