

Neutral Citation no. [2006] NIQB 101

Ref: HIGF5515

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 04.04.06

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

ALICE MULLAN

Plaintiff;

-and-

BRITISH TELECOMMUNICATIONS PCL

Defendant/Respondent;

DEPARTMENT OF REGIONAL DEVELOPMENT

Defendant/Appellant;

-and-

HABINTEG HOUSING ASSOCIATION (ULSTER) LIMITED

Defendant.

HIGGINS J

[1] This is an appeal by the second named defendant/appellant (hereafter referred to as the second defendant) against the decision of Master Wilson given on 13 January 2006 whereby he refused the second defendant's application for an order for specific discovery against the first defendant/respondent (hereafter referred to as the first defendant).

[2] The plaintiff sues all defendants for damages for personal injuries sustained in an alleged fall on the public highway at Glenbank Drive, Belfast. The statement of claim alleges that "she lost her footing and fell ... at a manhole cover which was not flush with the surrounding pavers".

[3] The second defendant served a notice for further and better particulars on the plaintiff, question 6 of which requested details of working operations at the scene. The plaintiff replied -

"The working operations referred to are the insertion of the manhole cover and the provision of the pavements surrounding the manhole cover. The plaintiff is unaware of the person or persons who carried out this work or the dates upon which it was carried. This is something which will be within the knowledge of the respective defendants who will have exclusive access to any documentation relating thereto and which is awaited by way of discovery by the plaintiff."

[4] The manhole cover is in fact a junction box installed by the first defendant. It was in place when the pavement was laid as part of the completion of the existing housing estate. Photographs taken at the time of the plaintiff's fall show the junction box cover below the level of the surrounding pavers on at least two sides. A later photograph shows the area after repair, with the junction box cover having a new border and level with the surrounding pavers.

[5] By their summons under Order 24 Rule 7 the second defendant seeks an order that -

1. The first named defendant provide discovery of all records in relation to the maintenance, inspection, repair and provision of a new manhole cover and surround at or about number 10, Glenbank Drive, Lisburn on and after 25 December 1999.
2. The first named defendant provide discovery of any memo, diary entry, investigation report or other document in relation to the necessity for the requirement that the said manhole cover ought to be repaired or replaced subsequent to the plaintiff's alleged accident on 25 December 1999.

[6] A request for this information by letter was refused. The second defendant states that no repairs were carried out at this location by the department. If the department had carried out such repairs, the necessary information about that would have been discovered to other parties, as occurs routinely in these types of negligence cases. The first defendant submits that even if the area was the subject of repair, that fact cannot be relevant to the present claim and opines that the policy of the second defendant in discovering documents in other cases is simply wrong and inexplicable in law.

Order 24 Rule 7 provides -

"7. - (1) Subject to rule 9, the Court may at any time, on the application of a party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or an class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavits under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified in described in the application and that it relates to one or more of the matters in question in the cause or matter."

[7] A party seeking discovery under Order 24 Rule 7 must make out a prima facie case that the other party has or had in his possession, custody or power the documents sought and that the documents he seeks relate to one or more of the matters in question in the action. This can be established by affidavit evidence or by inference or on the probabilities arising from the other circumstances of the case.

[8] The photographs of the scene before and after the alleged fall show a defect in the area of the junction box and a repair to that area. The affidavit of the second defendant avers that the repair was not carried out by the department and that the junction box is in the ownership of the first defendant. A repair has been carried out and so done, prima facie, by the first defendant. These matters are not really in dispute. The repair is relevant to the cause of action as it should show the nature and extent of the defect, the cause of the defect and the character of the repair. It may also establish who was responsible for the maintenance and upkeep of the area in question in the action.

[9] Counsel on behalf of the first defendant stated that the objection to providing discovery was made by the first defendant as a matter of principle.

It was submitted that a party does not provide evidence against himself, simply because he took steps to prevent the recurrence of an accident in which a person was injured. Reliance was placed on passages from the judgments of Bramwell and Channel BB, in *Hart v The Lancashire and Yorkshire Railway Company* 1869 21 Law Times Reports 261. In that case two trains were converging at speed on a main line at a railway station with sidings. At the same time a railway engine was on a siding returning from a coaling shed when its driver collapsed and the engine instead of being reversed continued on towards the main line. A points-man seeing the runaway train and in order to prevent it running onto the main line and colliding with the other trains, turned a set of points in order to send the engine down a branch line. This was done as the lesser of two evils. The engine ran into a stationary train on the branch line and the plaintiff, a passenger on that train, was injured. He sued the railway company for compensation for negligence. The negligence alleged was first, in not having two men on the engine and secondly, having the points of the siding so arranged that in the event of accident to the driver of an engine in the sidings, the engine would run onto the main line. After the accident the railway company altered the points system so that a runaway train would pass on to a dead-end siding, rather than on to the main line. It was alleged that the alteration to the points system was evidence of their previous negligence. Damages were awarded to the plaintiff at trial. The defendants appealed. It was held that there was no evidence of negligence on which the verdict could be supported. The employment of one man on the engine for the coaling operation was not negligent nor was the alteration of the points system on the siding evidence of antecedent negligence. At p 263 Bramwell B said –

"I think there are matters of considerable importance involved in this particular case. One of them is, that people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before."

[10] The other members of the Court expressed themselves in similar sentiment, though perhaps not so colourfully. No-one would disagree with the logic of the proposition which was expressed.

[11] In the instant case counsel on behalf of the first defendant asserted that the second defendant wished to establish that the first defendant had been negligent. Referring to Hart's case, *supra*, and the views of Bramwell B, he submitted that whatever occurred after the plaintiff's accident, for example by

way of repair, could not assist in proving negligence against the first named defendant.

[12] What the Court of Exchequer was dealing with in Hart's case was whether negligence could be proved simply by the subsequent alteration in the points system in the siding. It does not seem to me that the proposition expressed by Bramwell B should be determinative of an application for discovery of documents, post-accident and pre-trial. That proposition will apply to the facts proved in the trial and the mere fact of alteration is insufficient to prove antecedent negligence. An application for discovery is concerned with the relevance of the material sought, to the matters in question in the case. What is sought on this appeal is set out in the summons and relates clearly to matters that are relevant to the issues between the parties as disclosed in the pleadings. It does not seem to me that there should be a general rule that post accident records are not discoverable, based on Bramwell B's proposition. In this regard the practice of the second defendant, in claims against it, is both correct in law and logic. It depends on the relevance of the documents disclosed. In any event the circumstances as presently known about the junction box do not suggest a simple alteration of any previously existing state of affairs relating to the box and the pavement area in question; rather they point to the necessity for some repair to that area.

[13] Therefore the appeal will be allowed and I order discovery in the terms of the summons with costs above and below.