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

Delivered: **14/07/2017**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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Between

RUTH CHRISTINE MULLEN

Plaintiff:

and

SAMANTHA KERR

Defendant:

and

SOUTH EASTERN EDUCATION AND LIBRARY BOARD

Third Party:

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STEPHENS J

Introduction

[1] The plaintiff, Ruth Christine Mullen, sustained injuries on 18 November 2013 whilst walking on a private access road ("the access road") into her place of work at Bangor Central Nursery School. She was struck and knocked down by a car driven by Samantha Kerr ("the defendant"). The defendant has admitted liability and agreed damages at £200,000. Judgment has been entered in that amount together with an order for costs in favour of the plaintiff against the defendant.

[2] The defendant has brought third party proceedings against the South Eastern Education and Library Board ("the third party") which owns and occupies the access road alleging that the design of that road and its associated car parking spaces was negligent in that at the point where the collision occurred there was no segregation between vehicles and pedestrians by the provision either of a raised footpath or by marking out on the road surface an exclusive area for pedestrian use. The defendant also alleges that the third party was in breach of statutory duty in so far as the plaintiff was its employee and there was a failure to comply with Regulation 17 of the Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993 ("the 1993 Regulations") by failing to organise the workplace in such a way that pedestrians and vehicles could circulate in a safe manner. The defendant also relies on the third party's failure to carry out a risk assessment under Regulation 3 of the

Management of Health and Safety at Work Regulations (NI) 2000 ("the 2000 Regulations").

[3] The issues which arise for determination relate to the third party proceedings.

[4] Mr McCollum QC and Mr Ciaran McCollum appeared on behalf of the plaintiff, Mr Ringland QC and Mr McMahon appeared on behalf of the defendant and Mr Conlon QC and Mr McHugh appeared on behalf of the third party. I am grateful to counsel for their assistance.

Factual background

[5] The Principal of Bangor Central Nursery School is Mrs Williams. She took up that position in 2007 at which time there were three schools all occupying the same campus namely the Nursery School, Bangor Central Integrated Primary School, and Bangor Academy ("the campus"). The access for vehicles to the campus was from Castle Street but there was also a pedestrian access from Market Square. The longstanding arrangement when Mrs Williams took up post was that no parents' cars were allowed onto the campus but rather pupils for all three schools would be required to walk either from Castle Street or via the pedestrian access from Market Square in both of which locations cars could be parked. Cars belonging to members of staff were allowed onto the campus as were vehicles such as delivery vans.

[6] In 2008 the whole layout changed so that the campus was reduced to include only the Primary School and the Nursery School. There was no longer any access for vehicles from Castle Street with a new access being constructed onto Castle Park Road. The entrance from Castle Park Road was controlled by two barriers one for vehicles entering and one for those leaving. Members of staff were provided with a swipe card so that they could raise the barrier enabling access for their vehicle to the campus. Other persons wishing to drive into the campus would press a button on an intercom which was connected to the Primary School office. Personnel in that office could control the barrier deciding whether to permit entry. There was also a CCTV image of the entrance available to be viewed in the Primary School office.

[7] The access road from its junction with Castle Park Road to both the Primary School and the Nursery School was constructed with a footpath on the left hand side as one enters the campus. There was no barrier to pedestrian access from Castle Park Road.

[8] In 2008 at the other end of the campus the existing pedestrian entrance into Market Square was retained, though either by that date or subsequently, but substantially before 18 November 2013, Market Square became the Asda car park. In the rest of this judgment I will refer to that area as the Asda car park. The gate from the campus into the Asda car park was always a pedestrian gate and before the rearrangement of the campus it led from the parking area to a footpath from which pedestrians could gain access to all three schools. In 2008 in addition to retaining the

pedestrian entrance a short road with a hammerhead was constructed down to and beyond the pedestrian gate to the Asda car park ("the hammerhead road"). That road was in approximate terms as wide as the rest of the access road from Castle Park Road. The hammerhead road only leads to the pedestrian gateway to the Asda car park and also to what appears from the Google satellite photographs to be a pedestrian path through to a car park off Castle Street. As far as vehicles are concerned it is a cul-de-sac and the only reason for a vehicle to travel along it is to gain access to an electricity sub-station, though this only occurs approximately annually.

[9] It is necessary to describe the layout of the access road from the entrance on Castle Park Road through to the other end of the campus where the pedestrian entrance into the Asda car park is situated. A short distance after the entrance on Castle Park Road the access road sweeps to the left and throughout this bend on the right hand side there are car parking spaces. After the bend there is a straight initially with no car parking spaces on the right hand side of the access road. The first school off the access road is the Primary School at which point there is a mini roundabout so that a vehicle can be turned in order to leave the campus by going back to the entrance on Castle Park Road. However, if a driver does not drive around the roundabout and return, but rather continues straight ahead on the access road, there are some 6 more car parking spaces on the right hand side after which one comes to a T-junction ("the T-junction"). If one turns left at the T-junction there is a very short road for both vehicles and pedestrians leading to the entrance to the Nursery School with two parking bays marked on the left hand side on the road surface. If one turns right at the T-junction this is the hammerhead road which leads to the pedestrian entrance to the Asda car park, to the pedestrian entrance to the Castle Street car park and to the electricity sub-station. As appears from this description:

(a) the only vehicles which go beyond the mini roundabout on a daily basis are those making deliveries to the Nursery School and those using the 8 car parking spaces between the mini roundabout and the Nursery School;

(b) in order to use the 6 car parking spaces on the right hand side beyond the mini roundabout a vehicle has to turn at the T-junction by performing a 3-point turn;

(c) in order to use the 2 car parking spaces on the short road from the T-junction to the entrance to the Nursery School a vehicle has to be reversed towards the T-junction;

(d) pedestrians coming or going to the Primary and Nursery Schools could come into conflict with a vehicle performing a 3-point turn at the T-junction or reversing out of the 2 car parking spaces.

[10] The footpath on the left hand side of the access road which starts at the entrance off Castle Park Road ends at the T-junction. There is no footpath on the hammerhead road to the pedestrian entrance to the Asda car park or on the short road to the Nursery School from the T-junction.

[11] 500 pupils attend the Primary School and 80 pupils attend the Nursery School. All the pupils in both schools arrive to commence school at 9.00 am. The Nursery School has 12 members of staff the majority of whom arrive at 8.15 - 8.30 am though a secretary arrives at 9.30 am and the plaintiff arrived at 11.30 am 5 days a week to undertake 2 hours' work per day. The pupils leave Nursery School at 11.20 am or 1.30 pm or at 2.45 pm for the afternoon class. During the course of the day there will be deliveries to both the Primary School and to the Nursery School including, for instance, the school lunches being brought in by bus.

[12] On 18 November 2013 the plaintiff had parked her car in the Asda car park, done some shopping, then walked through the gate into the defendant's campus, and turned right onto the hammerhead road towards the Nursery School where she worked. She was walking along the middle of the hammerhead road and just at the T-junction the collision occurred.

[13] The defendant, who was not a member of staff but was a child minder, had driven in from Castle Park Road, gone past the mini roundabout, and was intending to park on the right hand side but before doing so was in the process of turning her car by turning right at the T-junction into the hammerhead road and then intending to reverse towards the Nursery School before driving back towards Castle Park Road. The defendant, who was driving at approximately 5 mph, only saw the plaintiff at the last moment. The plaintiff was struck by the defendant's car, with the collision occurring at the mid-point at the front of the car. There was some debate as to whether the defendant's view of the plaintiff was obstructed by fencing but I find that it was not.

[14] It was suggested to the defendant that she knew that her car should not be brought onto the access road. Ordinarily the defendant parked her vehicle in the Asda car park and walked in but on 18 November 2013 she was bringing a disabled child to an appointment in Newtownards and for that reason, by arrangement with those in authority, she was collecting another child from the Nursery School earlier than normal. The disabled child had great difficulty in walking and could not be left alone in a car. The defendant decided to drive into the access road so that she could park close to the Nursery School, walk in with the disabled child and collect the other child. The defendant did not ask for permission to do this but if she had then permission would have been granted. Mr Conlon accepted that the case should proceed on the basis that the defendant did have permission to drive into the access road and that no criticism should or could be made of her in that she did not have express permission.

[15] The third party had not carried out a risk assessment under Regulation 3 of the 2000 Regulations in relation to the access road and associated car parking spaces. There was no evidence of any consideration having been given by, for instance, a planning department in the third party organisation as to the risks posed by pedestrians coming into conflict with vehicles, as to which risks I find as a fact that the third party has in fact greater than average knowledge. The only evidence of any consideration as to the risks posed by the access road was of consideration by the head teachers. They are not experts in this area and they should not have been left by the third party to take on this responsibility on their own without the benefit of expert advice. There is a wealth of expertise as to how the needs of pedestrians should be taken into account when designing access roads and the layout of parking in, for instance, supermarkets and in particular schools. It is equally obvious that in a car park provision should be made so that pedestrians can walk through it easily and safely and this particularly applies where one has large numbers of very young children attending schools that potentially come into conflict with vehicles. Raised footpaths, crossing points, tactile distinctions and dropped kerbs are all design features. The head teachers are not experts in relation to the publications which would inform such design. The third party as an organisation should have considerable expertise in this area.

[16] It was common case that there were risks posed by the access road and its associated car parking spaces and that there should be measures to alleviate the conflict between pedestrians and vehicles. The measures which had been devised by the head teachers were to restrict the number of vehicles using the access road by requiring parents to park elsewhere, by making arrangements with Asda to allow parents to park in the Asda car park, by establishing a 10 mile per hour speed limit and by the use of warning signs. What was in issue was whether these steps with a particular focus on the T-junction were sufficient.

[17] The barriers at the Castle Park Road entrance to the access road are an integral part of the control of access to the campus limiting the number of vehicles and thereby reducing the risk of collisions occurring in the context of large numbers of pupils, their parents and others going into and out of the schools. On 18 November 2013 the barrier system was not working. It had not been working since November 2012. There were difficulties with the intercom system so that those in the Primary School office could not hear what was being said at the barrier. The response, whilst repairs were awaited, was to leave the barrier up. The intercom system was repaired on the day of the collision but after it had occurred. Subsequently, and on inspection by Mr Wright, Consulting Engineer for the defendant, on 24 November 2015 and on inspection by Mr Cosgrove, Consulting Engineer for the third party on 23 March 2017 the barrier was also found to be raised. No reason has been put forward for the barrier to have been left up in this manner on those further occasions. I find that at the time of the accident there were unresolved maintenance problems with the barrier which caused the barrier to be left in a raised position. I also find that for one reason or another the barrier was left in a raised position on a fairly regular basis. The consequence of these findings is

that those who were not permitted to drive their vehicles into the access road could do so. The evidence of the defendant was that she knew that a number of childminders did not comply with the requirement that they did not drive onto the campus. I find as a fact that the vehicles using the access road were not only staff vehicles, visitors' vehicles and delivery vehicles but also a relatively small number of vehicles driven by parents or childminders who did not comply with the school policy for reasons of, for instance, convenience. I find that one part of the system devised to alleviate the conflict between pedestrians and vehicles was not operating in that the barriers were left in a raised position allowing for additional vehicles to enter the access road. However, I do not assess the number of these additional vehicles as significant.

[18] Mrs Williams gave evidence that since she arrived at the Nursery School in 2007 there had been no collisions involving any vehicles on the campus, there had been no near misses to her knowledge and that no one had been injured. I accept this evidence. I also accept the plaintiff's evidence that she had worked at the Nursery School for 10 years prior to the collision, that she usually walked into the Nursery School and that she felt perfectly safe as a pedestrian and knew of no complaints.

Legal principles

[19] Employees such as the plaintiff are owed a duty of care at common law, a statutory duty under the Occupiers' Liability Act (Northern Ireland) 1957 and also duties under the 1993 and 2000 Regulations.

(i) General practice without mishap

[20] The third party relies on the fact that there hadbeen no accident or injury in relation to the use of the access road. I remind myself of the well-known statement of the law by Swanwick J in *Stokes v Guest, Keen & Nettlefold (Bolts & Nuts) Ltd* [1968] 1 WLR 1776, at 1783, which has been cited with approval many times:

> "… the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for (the) safety of his workers in the light of what he knows or ought to know; *where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad;* but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and *where he has in fact greater than average knowledge of the risks*, he may be thereby obliged to take more than average or standard precautions. He must weigh up the risk in terms of the likelihood of injury

> occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent." (emphasis added)

This formulation requires the employer to have given positive thought for the safety of his workers in the light of what he knows or ought to know. That is classic language for a risk assessment, though without the requirement that the assessment has to be recorded. Thereafter if there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, the employer is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad.

(ii) Occupiers' Liability

[21] In relation to the Occupiers' Liability Act (Northern Ireland) 1957 and by section 2(1) the occupier of premises owes to all his visitors the common duty of care, which is defined in section 2(2) as:

> "A duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

Section 2(3)(a), provides:

> "The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in a visitor, so that (for example) in proper cases (a) an occupier must be prepared for children to be less careful than adults."

That principle that children will be less careful than adults is also a feature of a risk assessment under Regulation 3 of the 2000 Regulations.

(iii) Risk assessments

[22] Regulation 3 of the Management of Health and Safety at Work Regulations (NI) 2000 ("the 2000 Regulations") provides at 3(1) that:

> "Every employer shall make a suitable and sufficient assessment of—

> (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and
>
> (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,
>
> for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions."

A right of action in civil proceedings is contained in Regulation 22(1) as amended by the Management of Health and Safety at Work (Amendment) Regulations (Northern Ireland) 2006. Under Regulation 22 as amended "(breach) of a duty imposed on an employer by these Regulations shall not confer a right of action in any civil proceedings insofar as that duty applies for the protection of a third party." Regulation 22 as amended goes on to provide that "third party", in relation to the undertaking, "means any person who may be affected by that undertaking other than the employer whose undertaking it is and persons in his employment." Accordingly, an employee, such as the plaintiff, has a right of action for breach of statutory duty but, for instance, a pupil does not.

[23] The Management of Health and Safety at Work Approved Code of Practice ("ACOP") has been approved for use in NI in association with 2000 Regulations. The ACOP focuses on risk assessments and how to use them effectively to identify potential hazards and risks and the preventive measures that can be applied.

[24] I consider that the following matters can be taken from Regulation 3, Regulation 22(1) as amended, the ACOP and the authorities:

(a) The 2000 Regulations owe their origin to the European Framework Directive (89/391/EEC). The underlying philosophy of the Directive is to create uniform levels of health and safety protection throughout Member States so as to ensure that competition does not take place at the expense of worker protection, see *Smith v Wilgar t/a Wilgar Contracts* [2011] NIQB 67.

(b) This is a statutory duty on the employer. In this case the third party is both the employer of the staff at the Nursery School and at the Primary School with both schools sharing the same campus and using the same access road and pedestrian entrance. I do not consider it appropriate for the employer to carry out separate risk assessments in relation to the Primary School and in relation to the Nursery School. The risk assessment should embrace all the risks faced by the defendant as the employer of all the employees on the campus. If I am wrong in relation to that then I do not consider that there

should be separate risk assessments in relation to the access road and the parking areas which are common to both undertakings.

(c) An employee has a right of action in any civil proceedings for breach of the statutory duty to carry out a risk assessment but, for instance, a pupil at the Nursery School would not have a right of action for breach of statutory duty though could rely on the failure to carry out a risk assessment as evidence of a breach of the common law duty of care.

(d) The risk assessment has to be both "suitable and sufficient." "Suitable and sufficient" are not defined in the 2000 Regulations but some explanation as to what will be considered as "suitable and sufficient" is provided in the ACOP (see for instance paragraphs 9 – 26).

(e) In *Scott v AIB Group (UK) Plc t/a First Trust Bank* [2003] NICA 3, at paragraph [14] Carswell LCJ stated that "… if an employer is unable through lack of expertise to assess the level of risk involved in any activity forming part of the undertaking conducted by him, he must seek the necessary expert advice." So if an employer lacks expertise in a particular area, then for a risk assessment to be suitable or sufficient, it should be informed by expert advice. There is guidance as to the use of experts in the ACOP at,for instance, paragraph 13 (a)(ii).

(f) The risk assessment has to assess not only the risks to the health and safety of employees to which they are exposed whilst they are at work but also it has to assess the risks to the health and safety of other persons "arising out of or in connection with the conduct by (the employer) of his undertaking." In this case that would involve an assessment of the risks to, amongst others, pupils attending both the nursery and primary schools.

(g) The risk assessment concerning an employee is in relation to risks whilst he is "at work."

(h) The word "risks" has to be given its ordinary meaning, which conveys the idea of a possibility of danger: *R v Board of Trustees of the Science Museum* [1993] 3 All ER at 858-9, per Steyn LJ. If it is not reasonably foreseeable that a particular type of incident might occur, then in principle that does not constitute a risk, see *Scott v AIB Group (UK) Plc t/a First Trust Bank* [2003] NICA 3.

(i) The purpose of the risk assessment is to identify the measures the employer needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.

(j) The measures which the employer needs to take are "the preventive and protective measures." Regulation 4 provides that "(where) an employer

implements any preventive and protective measures he shall do so on the basis of the principles specified in Schedule 1" which are the general principles of prevention set out in Article 6(2) of Council Directive 89/391/EEC

(k) Regulation 3 imposes a freestanding obligation on an employer although breach of it **can never be directly causative of injury**, see *Threlfall v Hull City Council* [2010] EWCA Civ 1147, [2011] ICR 209, [2010] 42 LS Gaz R 18, (2011) Times, 04 March, [2010] All ER (D) 184 (Oct) at paragraph [9], *Allison v London Underground Limited* [2008] EWCA Civ. 71; [2008] PIQR 10 at paragraph [58] and *Uren v Corporate Leisure (UK) Limited and Ministry of Defence* [2011] EWCA Civ. 66, at paragraph [39]. The court is assisted by consideration of what a properly conducted risk assessment would have revealed but, for instance, in the end, one of the questions in this case is whether the employer in fact organised the workplace in such a way that pedestrians and vehicles can circulate in a safe manner. So if the employer has in fact organised the workplace in such a way, then the lack of a risk assessment would be irrelevant. If the employer did not do so then the direct cause of the injury is the failure to do so.

(l) A breach of the duty under Regulation 3 can be indirectly causative of an injury. In *Uren v Corporate Leisure (UK) Limited and Ministry of Defence* at paragraph [39], Smith LJ stated that:

> "It is obvious that the failure to carry out a proper assessment can never be the direct cause of an injury. There will, however, be some cases in which it can be shown that, on the facts, the failure to carry out a risk assessment has been indirectly causative of the injury. Where that is shown, liability will follow. *Such a failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury.* A decision of that kind would necessitate hypothetical consideration of what would have happened if there had been a proper assessment." (emphasis added)

So for the failure to be indirectly causative of the injury the plaintiff has to establish on the balance of probabilities that (i) a suitable and sufficient assessment would probably have resulted in *a particular precaution* being taken and that (ii) that *particular precaution* would probably have avoided the injury.

(m) At paragraph [35] of her judgment in *Threlfall* Smith LJ considered the relationship between various statutory duties to carry out a risk assessment and the common law requirement to do so. I consider that in circumstances where there is a common law duty to take reasonable care then the logically

anterior requirement is for consideration to be given to the risks. In such circumstances the failure to carry out a risk assessment, even if it is not a statutory requirement, can be evidence of a breach of the common law duty of care.

(n) The requirement to record in Regulation 3(6) provides an important source of evidence.

(o) Regulation 3(4) and (5) apply in relation to the employment of a young person. Anyone under the age of 18 is a young person. Regulation 3(5) provides that in:

> "making or reviewing the assessment, an employer who employs or is to employ a young person shall take particular account of (a) the inexperience, lack of awareness of risks and immaturity of young persons; …"

There are no young persons employed by the defendant at the Primary School or at the Nursery School. However, the risk assessment which the defendant must carry out in relation to pupils attending both the nursery and primary schools should take into account the factors set out in Regulation 3(5) as those factors are no more than the factors which are applicable under the general law; see *Murray v McCullough as Nominee on Behalf of the Trustees and on Behalf of the Board of Governors of Rainey Endowed School* [2016] NIQB 52.

(iv) Regulation 17 of the 1993 Regulations

[25] The 1993 Regulations contain statutory duties owed by, amongst others, an employer to his employees. The Regulations apply to members of staff at the Nursery School but do not apply, for instance, to pupils, visitors and those persons making deliveries. Those individuals are owed a duty of care at common law and a statutory duty under the Occupiers Liability Act but are not owed any duty under the 1993 Regulations. The significance that the 1993 Regulations only apply to employees is that the Regulations use words such as "suitable" and "sufficient." In determining whether, for instance, a traffic route is "suitable" the question of suitability under the 1993 Regulations has to be considered in the context of employees rather than in the context of others such as pupils or their parents who use the traffic route. In relation to children and young persons in considering suitability the court would take into account factors such as those set out in paragraph [8] of *Murray v McCullough* [2016] NIQB 52, including the tendency for children and young persons to disregard risks. It would also take into account their physical characteristics, such as their size, so that they might not be seen by a driver particularly when reversing. The 1993 Regulations require that the traffic route is suitable for employees. It does not require that traffic routes are suitable for others. In determining whether, for instance, a traffic route is suitable for employees one takes into account that in general there will be many employees of varying degrees

of physical mobility with varying degrees of tiredness and attention. However, in this case they will all be adults and I consider that to be a significant distinction when addressing the question of suitability of the traffic route under the 1993 Regulations.

[26] Regulation 2(1) of the 1993 Regulations (in so far as relevant to this case) provides that "workplace" means, "…, any premises or part of premises which are not domestic premises and are made available to any person as a place of work, and includes (a) any place within the premises to which such person has access while at work; and (b) any room, lobby, corridor, staircase, *road or other place used as a means of access to or egress from that place of work* or where facilities are provided for use in connection with the place of work *other than a public road*, but shall not include a modification, an extension or conversion of any of the above until such modification, extension or conversion is complete" (emphasis added). On the basis of Regulation 2(1) Mr Conlon conceded, and I find, that the access road as described in this judgment constituted a "workplace" within the provisions of the 1993 Regulations as it provided the plaintiff with a means of access to and egress from the Nursery School, it was not a public road and the premises were not domestic premises.

[27] Mr Ringland submitted, and I agree, that the applicable Regulation in this case is Regulation 17 which under the heading "Organisation and suitability of traffic routes" (in so far as relevant to this case), provides that

> "17(1) Every workplace shall be organised in such a way that pedestrians and vehicles can circulate in a safe manner.
>
> (2) *Traffic routes* in a workplace shall be *suitable* for the persons or vehicles using them, sufficient in number, in *suitable* positions and of sufficient size.
>
> (3) Without prejudice to the generality of paragraph (2), *traffic routes* shall not satisfy the requirements of that paragraph unless *suitable* measures are taken to ensure that—
>
> (a) pedestrians or, as the case may be, vehicles may use a *traffic route* without causing danger to the health and safety of persons at work near it;
>
> (b) there is *sufficient* separation of any *traffic route* for vehicles from doors or gates or from traffic routes for pedestrians which lead onto it; and

(c) where vehicles and pedestrians use the same *traffic route*, there is *sufficient* separation between them.

(4) All *traffic routes* shall be *suitably* indicated where *necessary* for reasons of health or safety.

(5) …."

I have added emphasis to the words "traffic route" and "traffic routes." I have also added emphasis to the words "suitable", "sufficient", "suitably" and "necessary."

[28] Regulation 2(1) provides that "traffic route" "means a route for pedestrian traffic, vehicles or both and includes any stairs, staircase, fixed ladder, doorway, gateway, loading bay or ramp." In *Caerphilly County Borough Council v Button* [2010] EWCA 1311 Pill LJ stated that he "would take a broad approach to the expression traffic route" so that in that case "any reasonably used route from the car park to the building could be said to be a traffic route within the Regulation". I hold that the place where the collision occurred in this case comes within the definition of a traffic route within the 1993 Regulations.

[29] The word "suitable" appears in the 1993 Regulations and that word was considered in *Caerphilly County Borough Council v Button* in relation to Regulation 12 of the Workplace (Health, Safety and Welfare) Regulations 1992 ("the 1992 Regulations") which are the equivalent Regulations in England and Wales to the 1993 Regulations. That case concerned access for an employee from a car park to her place of work in circumstances where it was suggested that the condition of the access was inappropriate. Regulation 12 of the 1992 Regulations provided, amongst other matters, that "… the surface of every *traffic route* in a workplace shall be of a construction such that the … surface of the traffic route is *suitable* for the purpose for which it is used" (emphasis added). In that case counsel for the plaintiff had accepted that the suitability test under Regulation 12, was very similar to the test at common law as to whether sufficient care has been taken by the employers, or whether they had fallen below the standard of care which was to be expected of them as employers. Lord Justice Pill stated that this concession was realistic and at paragraphs [21] and [27] concluded that the extent of the duty in negligence and under Regulation 12 was "…very similar …." In arriving at that conclusion he referred to the judgments of Waller LJ and Schiemann LJ in *Marks and Spencer PLC v Palmer* [2001] EWCA Civ 1528, to the judgment of Smith LJ in *Ellis v Bristol City Council* [2007] ICR 1614 and to the analysis of Sedley LJ in *Taylor v Wincanton Group Limited* [2009] EWCA Civ 1581.

[30] I consider that as a consequence of the use of the word "suitable" in Regulation 17 of the 1993 Regulations the court has an obligation to carry out a broad qualitative assessment of suitability so that the extent of the duty in negligence and under the Regulation is very similar. Both at common law and

under Regulation 17 the factors include the likelihood of an accident occurring and the possible gravity of any injury which might occur. They will also include the history of accidents or complaints and the gravity of injuries, if any, which have occurred. Thereafter the court should then "stand back" and decide objectively whether in the light of those considerations it can be said that the traffic route in the workplace is suitable for the persons or vehicles using them. I also consider that the words "sufficient" and "necessary" have the same consequence of closely following the common law duty of care in the statutory duty.

[31] In considering the question of suitability under the 1993 Regulations and as was stated in *Caerphilly* it "is not, of course, for the (plaintiff) to say precisely what should have been done, but a consideration of possibilities may be relevant to assessing whether the employers have been in breach of their duty."

Discussion

[32] The hammerhead road was sufficiently wide to allow a footpath to be constructed or to allow for markings to be placed on the road demarcating an area for the exclusive use of pedestrians. If a footpath was constructed or an area was demarcated it could lead to a point at the far side of the T-junction where a crossing point could be demarcated on the road to connect into the existing footpath. The issue is not whether these precautions could be taken but whether (a) it was negligent or in breach of statutory duty not to take these precautions in so far as an adult such as the plaintiff was concerned (b) whether if they had been taken the plaintiff would have used the way reserved for pedestrians and (c) whether, if a risk assessment had been carried out, those precautions or some other precautions would have been taken by the third party in relation to the risk to pupils and that those precautions, even if implemented for pupils, would probably have avoided the injury to the plaintiff, an adult.

[33] In relation to the issue as to whether the third party is in breach of its duty to the plaintiff it is relevant to emphasise that the only vehicles which are driven on the hammerhead road are those making a three-point turn at the T-junction and very occasionally a vehicle gaining access to the electricity substation. On rare occasions there might be some other driver, not familiar with the layout, that mistakenly drives down the hammerhead road but for all practical purposes the only vehicles on that road are those that I have described. This was very light use of the hammerhead road by vehicles and overwhelmingly the movement of the vehicles only occurred at very limited times of the day.

[34] In effect for an adult this was an ordinary road being walked on by an ordinary person who was well used to the potential for vehicles at the T-junction. The plaintiff did not consider, nor do I consider, that the layout of the access road at the T-junction in the context of the limited number of vehicles in this area and the other precautions taken by the third party, posed *her* as an adult with a risk to *her* health and safety. The risk from negligent or dangerous driving by a motorist

remained but that was not a risk associated with the layout of the access road. Alternatively, if I am incorrect in finding that there was no risk to the plaintiff from the layout of the access road, then I find that the precautions taken in relation to an adult were adequate and that the traffic route was suitable for the plaintiff. I find that the third party was not in breach of its duty to the plaintiff either at common law or under the Occupiers' Liability Act (Northern Ireland) 1957 or under Regulation 17 of the 1993 Regulations.

[35] If a footpath had been provided on the hammerhead road as suggested by the defendant then the issue arises as to whether it would have been used. Given the rare occasions on which vehicles were on the hammerhead road I consider that both pupils and adults would have walked on the road as well as on any footpath that was constructed or demarcated. This means that, even if the defendant's suggested layout had been adopted by the third party, pedestrians and vehicles would still come into conflict at the T-junction. Furthermore I find as a fact that the plaintiff would not have used the layout as suggested by the defendant and the collision would still have occurred even if the defendant's suggested layout had been implemented.

[36] That is not an end of the defendant's case against the third party because there was a failure by the third party to carry out a risk assessment in relation to the access road. That risk assessment should have assessed the risk not only in relation to adults but also in relation to pupils. I consider that a suitable and sufficient assessment in relation to pupils would probably have resulted in additional precautions being taken at the T-junction. However, I am not prepared to hold that the additional precautions would have included a precaution that would probably have led to the injury to the plaintiff being avoided. The additional precautions could have been limited to additional warning signs directed to parents and the provision of supervision by members of the staff of the T-junction whilst pupils were either arriving or leaving.

[37] The only precaution that I consider would have led to the injury to the plaintiff being avoided was to recognise that the hammerhead road is for all practical purposes a pedestrianised area which should have been formally designated as such by placing a gate for vehicles at the start of that road. This would have prevented vehicles from using the hammerhead road except if a key was obtained. In that way the area beyond the gate would be secure for pedestrians who would be free to walk on all parts of the hammerhead road. On the right hand side of this vehicular gate as a pedestrian walked towards the Nursery School from the Asda car park, a short footpath could be constructed allowing pedestrian access to the right hand side of the gate. In this way the area would be laid out so that when a pedestrian arrived at the vehicular gate the only method of passing would be by using the footpath with railings preventing individuals from walking onto the T-junction area until they reached a point opposite the existing footpath. In this way there would be increased control of conflict between pedestrians and vehicles at the T-junction. However, I do not consider that a risk assessment would have led to this

precaution. This means that the failure to carry out a risk assessment has not been indirectly causative of the injury to the plaintiff.

Conclusion

[38] I enter judgment for the third party against the defendant in relation to the third party proceedings.

[39] I will hear counsel in relation to the question of costs.