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Judgment: approved by the Court for handing down | *Delivered:* **07/03/2005**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF CRAIGAVON

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BETWEEN:

PATRICK McKNIGHT

Plaintiff/Respondent;

-and-

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant/Respondent.

-and-

M & P BRADLEY

Defendant/Appellant.

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HART J

[1] This is a civil bill appeal from the decision of Mr Aidan Canavan sitting as a Deputy County Court Judge at Lisburn County Court on 8 March 2004 in which he awarded the plaintiff £4,000 damages with the decree to be against M & P Bradley (Bradleys) and dismissed the civil bill against the Department for Regional Development (the DRD). There is no dispute about quantum. The plaintiff's claim arose out of injuries he received when he tripped after leaving his house in Poleglass on 1 February 2000 at 5.20 am to go to work. He alleges that he tripped because some 20 streetlights were out in the cul-de-sac where he lives and in the surrounding area.

[2] It is common case that this had been reported to the DRD on 25 January 2000 and steps were immediately put in hand by the DRD to locate and repair the fault. The location of the fault was narrowed down to a particular location and on 27 January 2000 Mr Mills of the DRD gave instructions to Bradleys in the form of a works order requiring them to excavate and repair the fault.

[3] The work was in fact being carried out on behalf of Bradleys by their sub-contractor, Mr Malone of Britannia Electrical Services, and Mr Mills contacted Mr Malone direct to save time as he was accustomed to do.

[4] In order that the repair could be carried out Mr Malone required a particular type of joint called a resin or pour joint, but he did not have the necessary joint in stock. In the event he was unable to obtain one until 2 February 2000 when he carried out the repair work, although he accepts that on 27 January 2000 (a Thursday) he had expected to obtain the necessary joint the next day and to complete the job then.

[5] The DRD denies that it was under any duty of care towards Mr McKnight. In the alternative, the DRD argues that it had a measured term contract with Bradleys, and that under the terms of the measured term contract Bradleys were obliged to repair the fault within 24 hours of being instructed to do so by Mr Mills. As the fault was not in fact repaired until 2 February 2000 the DRD argues that any fault therefore lies with Bradleys. Bradleys deny that this was the effect of the contract, and maintain that under the contract they had ten days in which to carry out the repair. Since the work was done within that period they were not in breach of their contract with the DRD.

[6] Before turning to the legal issues, it is necessary to consider some of the facts in somewhat greater detail. Unfortunately, Mr Mills has died since the hearing in the County Court, but, in the event, there was no material dispute as to what his part was in these events. Mr Malone conceded that when he told Mr Mills on 27 January that he would install a resin joint the next day it was reasonable for Mr Mills to assume that the work would be done the next day, 28 January.

[7] Mr Malone said that, although he had never read the contract, he thought that he had ten days to do a repair, nevertheless wherever possible he tried to carry out the repair on the same day as he received the instruction. It was conceded by Mr Skelly of the DRD that in the lower court both he and Mr Mills accepted that the contractor had ten days to do the job when a works order was issued to them by the DRD. His reason for agreeing that Bradleys had ten days to do the job in this case was because the document issued to Bradleys was headed "works order", to which the ten day rule applied. Bradleys naturally point to the acceptance by Mr Skelly and Mr Mills that

they had ten days to do the job as supporting their argument that the correct interpretation of the contract documents was that they had ten days to perform this task.

[8] However, Mr Skelly conceded that he was not in charge of this contract. He also accepted that this was an urgent job because there were so many lights out, which is not easily reconcilable with his belief that Bradleys had ten days to do the work. In addition, Mr Richard Robinson, who was the DRD employee responsible for cable faults and street lighting in the Belfast area, and who was responsible for this contract, did not accept that Bradleys had ten days to do the job. He pointed to the heading of the works order issued by Mr Mills which read "Street Lighting Works Order (Cable Faults)," and said that the words "Cable Faults" clearly indicated that the instruction was to restore a cable fault. In other words, it was not a general works order, in which case he accepted that the contractor had ten days to repair the fault, but it specifically related to cable faults and therefore Bradleys had to fix the fault within one day of being instructed to do so. His uncontradicted evidence was that Bradleys responded on other occasions within one day, and indeed had responded to such instructions on several times in one day. Mr Mulholland of Bradleys contended that their obligation was merely to attend within one day and that they then had ten days to complete the work.

[9] Whilst I accept that Mr Robinson's view as to what he believed the relevant period was is to be preferred to that of Mr Skelly, because the latter was not responsible for this contract, nevertheless that an experienced employee such as Mr Mills was under the impression that the relevant period was ten days suggests that there was confusion within the DRD as to what was Bradleys obligation. However, it must be remember that "it is not legitimate to use as an aid to the construction of the contract anything which the parties said or did after it was made", see James Miller and Partners Limited v Whitworth Street Estates (Manchester) Limited [1970] AC 572, at 603.

[10] What was the contractual obligation of Bradleys towards the DRD? Was it, as Bradleys contend, that they only had to attend at the scene of a suspected cable fault within one day, and thereafter had ten days to repair the cable fault, or, was it as the DRD contended through Mr Robinson, that the repair had to be completed within one day of notification? The original contract was not produced and the parties based their arguments upon the meaning of various parts of the tender documents which it was agreed were applicable. Two portions of the tender documents are material. At T4 there appears a column headed "Time for Completion Clause 43 (weeks)". That column provides that the time for completion in the case of "Works Orders" is ten days, for "Cable Fault Repair Service" it is one day and for "Urgent Response" it is four hours. Page T4 would therefore appear to create a hierarchy of times within which work is to be completed, and in the case of a

task designated as a "Cable Fault Repair" the work has to be completed within one day of notification. However, Mr McKelvey relied upon the wording of Clause 47(2)(iv) at C 4 which provides that:

> "In the event of a cable fault to any street lighting unit or lit sign unit etc, the Contractor is required to provide a cable fault repair service to attend to the fault within 24 hours of notification or alternatively within four hours under urgent response service."

He argued that this meant that the contractor was not required to "complete" repairs within 24 hours, only "to respond to a call out" within 24 hours in order to identify and locate a fault, and thereafter the contractor had ten days to complete the necessary works under the works order.

[11] Whilst I am satisfied that T4 clearly requires a task designated as a "Cable Fault Repair" to be completed within one day, the wording of Clause 47(2)(iv) is not as clear. The words "to attend to the fault" could either mean "deal with" in the sense of completing the work required, or it could have the more restricted meaning of giving one's "attention, efforts or presence (to)", one of the meanings given for "attend" in the New Shorter English Dictionary. Were these words the only relevant words in Clause 47(2)(iv), then I think that Mr McKelvey's argument would have considerable force. That in turn would require the court to consider whether there was an ambiguity in the contract leading to the invocation of the *contra proferentum* rule.

[12] However, the obligation under Clause 47(2)(iv) is not just to "attend to" the works order, but to "provide a cable fault repair service to attend to the fault within 24 hours of notification etc" (my emphasis). As the obligation is to provide a repair service I believe the meaning of the clause is tolerably clear, namely that the contractor is to go to the scene of, and repair, the fault within 24 hours of notification. In that case there is no ambiguity within the clause, or conflict between it and the completion obligation at T4.

[13] I therefore hold that Bradleys obligation under their contract with the DRD was to respond to and repair a cable fault identified to them as such within 24 hours of being requested to do so.

[14] In the event that I held against him on this point Mr McKelvey advanced an alternative argument to the effect that in this particular instance Mr Mills contracted with Bradleys on the basis that the time for completion for ten days. Whilst Mr Mills made this concession in the County Court, Mr Malone conceded before me that it was reasonable for Mr Mills to assume that the work would be done the next day. That is supported by Mr Malone's note of 27 January 2000 and by Mr Mills' entry on the Street Lighting Cable

Fault Record which he obviously completed on the same day. Therefore, whilst Mr Mills may have subsequently, but erroneously, thought that the contract gave Mr Malone as Bradleys sub-contractor ten days to complete the work, at the time I am satisfied that both he and Mr Malone believed on 27 January that the work would be done on 28 January. In those circumstances I do not consider that there is a factual basis for arguing that there was a variation of the contract between the DRD and Bradleys and the point does not therefore arise.

[15] It is accepted that if the DRD are liable there is a contractual obligation on Bradleys to indemnify the DRD. I am satisfied that the failure of Bradleys sub-contractor, Mr Malone, to complete the repair within one day of being requested to do so means that should the DRD be held liable to Mr McKnight, Bradleys must indemnify the DRD as Bradleys failed to comply with the contractual obligation to do the work within the stipulated time.

[16] This brings me to the argument submitted by Mr Mack for the DRD which was that the DRD had a discretion whether to not to provide street lighting and therefore there was no duty of care on them towards Mr McKnight, nor was there any actionable negligence on their part. He relied upon the decision of Kerr J (as he then was) in Maye (a minor) v Craigavon Borough Council [1998] NI 103. In Maye the street lighting decisions of the Court of Appeal in Farrell v Northern Ireland Electricity Service [1977] NI 39, and Chambers v Department of the Environment [1985] NI 181, were considered. For Mr McKnight, Mr Colton argued that, despite the decision in Maye, Chambers remained good law. I should say that Mr Mack also referred to a decision by Weatherup J in Sullivan v DRD, also a street lighting case, where judgment was given for the DRD. However, though I have confirmed that this was the effect of the decision, there was no written judgment and I did not consider it necessary therefore to re-list the matter for further argument before counsel in the absence of such a judgment.

[17] The starting point for consideration of this question must be Article 44 of The Roads (Northern Ireland) Order 1993:

> "*Street lighting*
>
> **44.**—(1) Where the Department considers that any road should be illuminated or better illuminated, it may provide for—
>
> (a) the supply of electricity or other means of illumination by any person having power in that behalf;

(b) the installation of such system of illumination (including lamps, lamp posts, cables, supports for cables and other materials and apparatus) as appears to the Department to be necessary for the purpose; and

(c) the operation and maintenance of any system of illumination installed under this Article.

(2) Where the Department considers that it is in the public interest for a street or footpath to which the public has access to be illuminated or better illuminated, the powers of the Department under paragraph (1) shall be exercisable in relation to that street or footpath as if it were a road.

(3) The Department may alter or remove any system of illumination installed under paragraph (1) or (2).

(4) The Department may provide for the operation and maintenance of any system of illumination installed under Article 24 of the Roads (Northern Ireland) Order 1980 and may alter or remove any such system.

(8) In this Article—

'footpath' means a way over which the public have a right of way on foot only, not being a footway or other part of a road;

'street' means any street, lane, square, court, alley or passage, not being a road."

[18] It is clear from the wording of Article 44 that the DRD has a statutory power to provide street lighting, but a discretion as to whether or not it does so. In Maye Kerr J had to consider Article 7 of the Litter (NI) Order 1994 which imposed a duty on local authorities to keep roads within their area clean and free from litter. At pages 108 and 109 of Maye he considered the effect of Lord Browne-Wilkinson's speech in X (minors) v Bedfordshire C. C. [1995] 2 AC 633:

"Negligent discharge of the statutory duty

This topic is dealt with by Lord Browne-Wilkinson under the heading 'The careless performance of a statutory duty—no common law duty of care' in the *Bedfordshire CC* case (at 732–735). He considered that most of the confusion which has surrounded the topic derived from a misunderstanding of the dictum of Lord Blackburn in the *Geddis* case. Lord Browne-Wilkinson stated (at 733) that *Geddis* 'is best treated as a decision that the careless exercise by the defendant of a statutory duty or power provides no defence to a claim by the plaintiff based on a free standing common law cause of action'. He gave his conclusion on this matter as follows (at 734–735):

> 'In my judgment the correct view is that in order to found a cause of action flowing from the careless exercise of statutory powers or duties, the plaintiff has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient.'

I believe that Lowry LCJ's decision in *Farrell* (even as subsequently explained in *Chambers v Dept of the Environment* [1985] NI 181) cannot survive the treatment of the topic by Lord Browne-Wilkinson in the *Bedfordshire CC* case. In my opinion, it is now clearly established that the careless performance of a statutory duty will only give rise to liability if a duty of care at common law exists.

The common law duty of care

In considering whether a common law duty of care arises in the performance of statutory functions, Lord Browne-Wilkinson stated that a distinction must be drawn between cases in which the duty of care is said to arise from the manner in which a statutory discretion is exercised and those in which it is alleged to arise from the manner in which the statutory duty has been implemented in practice. If the decision complained of falls within the ambit of statutory

> discretion it is not actionable. On the other hand, if the decision is so unreasonable that it falls outside the ambit of discretion conferred, it can (but not necessarily will) give rise to common law liability. If the duty of care is claimed to arise from the manner in which the statutory duty has been performed, the question whether there is a common law duty of care falls to be decided by what Lord Browne-Wilkinson described (at 739) as 'the usual principles i.e. those laid down in *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605, 617–618'.

[19] At first sight the reference in the above passage to the street lighting cases of Farrell and Chambers provide strong support for Mr Mack's argument. However, in Bedfordshire Lord Browne-Wilkinson also dealt with what was commonly termed "operation negligence" under the heading " Discretion: justiciability and the policy/operational test". Having considered the relevant authorities he concluded at page 738:

> "From these authorities I understand the applicable principles to be as follows. Where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not for the courts, to exercise the discretion: nothing which the authority does within the ambit of the discretion can be actionable at common law. If the decision complained of falls outside the statutory discretion, it *can* (but not necessarily will) give rise to common law liability. However, if the factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on such policy matters and therefore cannot reach the conclusion that the decision was outside the ambit of the statutory discretion. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist."

[20] Had Lord Browne-Wilkinson left the exercise of discretionary power there then that would provide further support for Mr Mack's argument. But in the passage which immediately follows he went on to consider what should be the position if the plaintiff alleged carelessness in the exercise of a discretionary power:

> "*3. If justiciable, the ordinary principles of negligence apply*
>
> If the plaintiff's complaint alleges carelessness, not in the taking of a discretionary decision to do some act, but in the practical manner in which that act has been performed (e.g. the running of a school) the question whether or not there is a common law duty of care falls to be decided by applying the usual principles i.e. those laid down in *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605, 617-618. Was the damage to the plaintiff reasonably foreseeable? Was the relationship between the plaintiff and the defendant sufficiently proximate? Is it just and reasonable to impose a duty of care? See *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473; *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53.
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> However the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done. The position is directly analogous to that in which a tortious duty of care owed by A to C can arise out of the performance by A of a contract between A and B. In *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145 your Lordships held that A (the managing agent) who had contracted with B (the members' agent) to render certain services for C (the Names) came under a duty of care to C in the performance of those services. It is clear that any tortious duty of care owed to C in those circumstances could not be inconsistent with the duty owed in contract by A to B. Similarly, in my judgment a common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties."

[21] It is instructive to compare the treatment in the passages from the judgment of Lord Browne-Wilkinson and Kerr J which have been quoted above with the treatment of this issue by Gibson LJ in Chambers:

> "Within the purely operational field it is possible to say that Parliament when granting a discretion to a

public body cannot, in the absence of express provision to the contrary, have intended that the dicretion (*sic)* should be exercised in such a way as to injure any member of the public in circumstances where, by the exercise of due care towards those who are likely to be injured thereby, the accident could have been avoided. If, therefore, a servant of such a body while acting within the operational field causes injury by reason of his lack of due care, it may be said that he has acted in excess of his delegated power and, therefore in an ultra vires manner, and so the body may be liable for his negligence. But, of course, the same cannot be said of a servant who within the policy field has acted in a way which apparently lacks the care that would ordinarily be expected towards a member of the public. In such a case it must be shown by the plaintiff that there was a vitiation of the discretionary act complained of because it was taken without due regard to some matter necessary to be taken into consideration, or was done in reliance upon some matter which it was illegitimate to take into account, or has otherwise been done in excess or abuse of power, so that in any such event it was ultra vires the undertaking body.

In the present case all one knows is that the defendant had a public power to light the street in question and that it exercised its discretion to do so and in fact did provide lighting, but that for some four days before the accident the lighting had been discontinued or was not operational. As the defendant had a discretion to introduce the street lighting it also had a discretion to withdraw it and could legally have done so. On the other hand, there may have been no policy decision at any level in the hierarchy of the defendant as a result of which the lights ceased to be effective. In that latter event the defect would have been at the operational level. A failure of the lights as the operational level may have been occasioned by negligence or it may have occurred without any lack of care on the part of any person employed by the defendant. It is only in circumstances where the failure was due to negligence and thus ultra vires that the court would have to proceed to enquire whether the plaintiff is one of the class of persons for whose protection the defendant should have had regard and

that the absence of the street lighting caused or contributed to her fall."

[22] Although a negligent exercise of a discretionary power was characterised as ultra vires and hence actionable by Gibson LJ, Lord Browne-Wilkinson's formulation of the principle in the passage quoted above does not rely on the ultra vires principle, but requires the court to consider whether there is a separate common law duty of care in such circumstances. The final sentence of Gibson LJ's judgment is, in my opinion, very similar to the principles formulated by Lord Browne-Wilkinson at page 739 in the passage quoted above, save that the third principle laid down in Caparo Industries would have to be addressed.

[23] In Maye at page 110 Kerr J observed that "It has not been claimed on [the plaintiff's] behalf that the defendant purported to exercise its discretion as to how its statutory duties should be performed in a manner which brought it outside the ambit of its discretion." In the present case that is the issue which arises, and I consider that Maye is distinguishable from the situation which Lord Browne-Wilkinson was considering at page 739 of the Bedfordshire case, namely negligence in the practical manner in which a statutory discretion has been performed. I therefore do not consider that Maye prevents the court in the present case from considering whether the plaintiff should recover.

[24] In order that he should recover Mr McKnight has to surmount two distinct obstacles. The first is whether there was some carelessness on the part of the DRD in not having the street lighting repaired sooner. The second is whether, if that question is decided in favour of Mr McKnight, the court has persuaded that there existed a common law duty of care by applying the threefold test laid down in Caparo.

[25] So far as the first question is concerned, I accept that the DRD considered the failure of some 20 street lights in this residential area required an urgent response. Mr Mills recorded it as "urgent" on 25 January, and Mr McDonnell of Clarke's Engineering was told that it was urgent to get them fixed. Until 27 January I am satisfied that everything was done that could reasonably be done to identify and locate the fault. However, the delay from 27 January to 2 February in repairing the fault was solely due to Mr Malone's failure to have the correct type of pour joint required available. I consider that it is incumbent upon the contractor (and hence upon its sub-contractor) to have the necessary materials available to carry out its obligation under the contract. In any event, the evidence was that a larger joint could have been used in this case, and the necessary resin obtained from Engineering Distributors. However, Mr Malone chose to wait for a joint to be delivered from England and relied upon Engineering Distributors to obtain one without exploring whether an appropriate joint could be obtained more rapidly. I

accept that a firm called Jointing Technologies promised next day delivery, but this does not appear to have been explored by either Engineering Distributors or Mr Malone. Given the urgency of the situation this was an avoidable and unacceptable delay and one which I consider constitutes negligence on the part of the contractor. Whilst the negligence was in fact that of Mr Malone, it is agreed that Bradleys have to indemnify the DRD. I therefore find in favour of the plaintiff on the first question.

[26] I now turn to consider whether there was a common law duty of care towards Mr McKnight on behalf of the DRD in accordance with the tests laid down in Caparo.

(i) Was the damage to Mr McKnight reasonably foreseeable? This was a densely populated residential area in which many pedestrians of all ages and physical conditions would be expected to be traversing the streets in the hours of darkness. The absence of street lighting gives rise to a clearly foreseeable risk of injury to pedestrians, as indeed I believe the DRD's recognition that repair of the street lighting was urgent demonstrates.

(ii) Was the relationship between Mr McKnight and the DRD sufficiently proximate? Clearly it was given that he was a resident in one of the houses in the area where the street lighting was out.

(iii) Is it just and reasonable to impose a duty of care? I am satisfied that it is. The DRD and its predecessors have provided street lighting in urban areas for well over a century in order to make the streets safer in the hours of darkness. Despite the imposition of liability upon street lighting authorities as a result of the Farrell and Chambers decisions there is nothing before me to suggest that imposing a duty of care upon the DRD or its predecessors has been inconsistent with, or has had a tendency to discourage provision of street lighting by the DRD.

[27] I therefore conclude that there was a duty of care on the part of the DRD towards Mr McKnight, and that as a result of the failure of the DRD to ensure that the lights were promptly repaired there was a breach of that duty of care and so Mr McKnight is entitled to recover against the DRD. However, as the actual negligence was on the part of Mr Malone as Bradleys' sub-contractor, the decree will be against both the DRD and Bradleys. As it is agreed that the DRD is entitled to a complete indemnity from Bradleys, Bradleys will indemnify the DRD in full for the damages and the DRD's costs. I therefore affirm the award of £4,000 to the plaintiff. As the decree was within the district judge's jurisdiction and the appeal was heard over two days I will hear the parties on the amount of costs.