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Judgment: approved by the Court for handing down | *Delivered:* **13/1/06**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

MARGRETTA REID

Plaintiff

and

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant

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Mr P D Smith QC
Sitting as Deputy Judge of the High Court

[1] On the morning of 31 July 2001 the plaintiff, who was then 71 years of age having been born on 11 July 1930 fell and sustained injury as she crossed Main Street, Portglenone, County Antrim.

[2] The plaintiff had been shopping in Portglenone with her husband. Having left a home bakery they both proceeded to cross the road. At the point at which they crossed there was, on the opposite side, a lay-by for buses and this was separated from the carriageway by a line of kerbstones.

[3] These kerbstones were not of the type which one normally sees at the edge of the footpath and which have a right angled edge. Instead they had a flat top which abutted and was approximately flush with the surface of the lay-by and then a sloping portion which sloped downwards towards the carriageway at an angle of 12½-15 degrees. At the point where the kerbstones met the carriageway they had a rounded nosing.

[4] The plaintiff said that she had tripped and attributed her trip to her toe catching in a hole. She said that the hole was at one of the kerbstones to which I have referred, specifically the third kerbstone to the left, as she crossed the road, of a gully trap in the carriageway, a location confirmed in evidence by her husband. About 5 weeks later, on 3 September 2001, her

husband pointed out the area of the plaintiff's fall to Mr James Nicholas Burnside of Burnside and Logue, the plaintiff's solicitors.

[5] Mr Burnside inspected the location and took photographs which were before the court and made measurements. The photographs show a depression in the asphalt or bitmac surface of the carriageway immediately adjacent to the kerbstone to which I have already referred. Mr Burnside measured the height of the exposed vertical face of the kerbstone at this point at 30mm. Subsequently on 13 October 2001 Mr Reid pointed out the same spot to Mr John McQuillan, a supervisor employed by the defendant, and he measured the height of the exposed vertical face at 25mm. I conclude that at the material time the height of the exposed vertical face immediately adjacent to the depression was of the order of 25–30mm. Mr McQuillan accepted that weathering or wear of the carriageway had given rise to the greater exposure of the kerbstone at the locus.

[6] Mr David Andrew McKeown, Consulting Engineer, gave expert evidence on behalf of the plaintiff. He said that the defendant Department had a policy of repairing trips of 20mm high or greater. He had inspected the location and taken photographs. By that time (19 January 2004) the depression had been repaired. He thought that the town centre location was relevant. People would have been regularly crossing the road to the bus stop. The effect of the repairs had been to eliminate the vertical edge or face of the kerbstone where it met the asphalt surface of the carriageway.

[7] In cross-examination Mr McKeown was shown excerpts from Northern Ireland Housing Executive drawings including a detailed sheet showing, among other things, kerbstones similar to, but not identical to, the kerbstones to which I have referred. The illustration of the kerbstone in the relevant position gave a measurement of 25mm for the exposed vertical face adjacent to the highway.

[8] Mr McKeown said that the kerbstone shown differed from the kerbstones in question as it did not have the rounded nosing which measured 16–19mm vertically. This, he suggested, should be accommodated in the vertical portion (reducing the vertical face to 6–9mm approximately). If it were not, he would regard the trip as unacceptable. In his examination in chief he had pointed out that more people would have been traversing the location of this accident than at places where this type of kerbstone would be in use in a Housing Executive estate.

[9] Mr Michael McLaughlin, Consulting Engineer, gave expert evidence for the defence. He was the source of the Housing Executive drawings which he dated from the early to mid 1980s and which related to housing estate roads. He agreed that there would have been a rounded nosing of 16-19mm. He thought that this would have been accommodated in the sloping portion

(he called it the "the battered rise") which had a vertical height of 40mm. The detail was a standard one and the roads in which the kerbs were laid would have been adopted subsequently by the Government's Roads Service. The 20mm trip height for road maintenance had been adopted throughout the United Kingdom as a result of the report of the Marshall Committee in the early 1970s. The defendant had no trip height for kerbs. In cross-examination Mr McLaughlin agreed that the 20mm figure applied to potholes in the carriageway as well as trips on the footpath. He said that because of the visibility of the kerb it could safely have a higher vertical face.

[10] Mr Aidan William McHugh said in evidence that he was a road maintenance observer employed by the defendant. He had inspected Main Street, Portglenone in 2001 at 4 weekly intervals. He carried a block and tape for the purpose of a identifying differences in level of 20mm or more. He did not measure the height of the kerb face adjoining the carriageway. In June 2002 he had noted that there was an unevenness in the adjacent asphalt running roughly at right angles to the kerb line and giving rise to a trip of 23mm in depth. Repairs were carried out on 27 June 2002. In cross-examination he said that he would have measured a difference in level between 2 kerbstones. He would not have measured the height of the vertical face of the kerbstone even if he had noticed the depression in the asphalt.

[11] Mr Robert Stewart McKay was the last witness called for the defendant. He is the Section Engineer for Ballymena and Larne. He had been second in command at the material time. He could find no records to indicate when the kerbstones had been laid. He had interviewed 4 men of 25 years' standing and they could not remember this being done. He had concluded that they had been laid by Antrim County Council before 1973. There had been no complaints about the condition of the locus, other than that made on the plaintiff's behalf, in the year after or before the accident.

[12] Mr McKay said that the kerbstones had been laid as they had in the interests of overall safety. There had to be an appreciable rise above the adjacent carriageway to indicate to an errant driver that his or her vehicle was leaving the carriageway and intruding onto the lay-by. There is no definitive standard as to the minimum or maximum height that a kerbstone laid in this manner should protrude above the carriageway, but on a completely level road it had to present a sufficient barrier to get water from the carriageway to flow to a gulley trap.

[13] As a result of the report of the Government appointed Marshall Committee in the 1970s the Roads Service had adopted a 20mm standard for abrupt changes in level in particular surfaces as part of a sustainable maintenance policy. It does not apply to the edges of kerbs. There could be a difference in level of 50mm where kerbstones are laid flat in difficult drainage

situations – for example along the edge of a road at the bottom of a hill or for the protection of private property.

[14] Some aspects of Mr McKay's evidence were developed in the course of cross-examination. He said that the kerbstones laid flat were intended to signal shared surfaces, such as those shared by vehicles and pedestrians. Nowadays kerbstones of a similar design but set upright rather than flat would be recommended as they would be less likely to rock. Even accepting that the carriageway at the locus was eroded at the time of the accident there had not been an actionable defect.

[15] Summarising the material defence evidence it indicated that a trip of 20mm or more caused by deterioration in the surface of the footpath, or a trip of a similar height caused by deterioration in the surface of the carriageway (eg a pothole with these characteristics) or a trip of similar height between two kerbstones would all trigger repair but a difference in height between the carriageway and the kerb along its edge of even 30mm would not do so even if caused by deterioration or erosion of the roadway.

[16] The plaintiff's sole cause of action is in breach of statutory duty. That statutory duty is imposed on the defendant by Article 8(1) of The Roads Order (NI) 1993 which, so far as is material, reads as follows:

> "The Department shall be under a duty to maintain all roads …".

The true interpretation and application of the duty so described were considered in some detail by Girvan J in Keenan v Department of the Environment [1995] NI 342. I gratefully adopt the propositions he adumbrated and which I summarise, I hope accurately, as follows:

(a) The plaintiff must prove that the road was in a dangerous state as a result of a failure to repair and maintain.

(b) The determination of this question is one of fact and degree.

(c) The test of dangerousness is objective.

(d) Judicial minds may legitimately differ as to whether a defect makes a road dangerous provided the proper test is applied.

(e) The fact that a plaintiff falls and sustains a serious injury does not per se condemn the road as dangerous.

(f) The fact that the road is "potentially hazardous" likewise does not in itself lead to the conclusion that the road is dangerous (see Frazer v Department of the Environment (1993) 8 NIJB 22).

(g) The test has been expressed by the courts in various ways. The most comprehensible and workable was stated by Denning LJ in Morton v Wheeler (1956) The Times, 1 February, in the following terms:

> "If a reasonable man, taking such contingencies into account, and giving close attention to the state of affairs, would say `I think there is quite a chance that someone going along the road may be injured if this stays as it is,' then it is a danger; but if the possibility of injury is so remote that he would dismiss it out of hand, saying: `Of course, it is possible but not in the least probable,' then it is not a danger."

(h) The question of what constitutes dangerousness is not answered by the application of an absolute standard. The locus of the relevant road is a relevant factor.

[17] In Frazer v The Department of the Environment, the Court of Appeal decision to which I have already referred above, Sheil J (as he was then), with whom Murray LJ concurred, said (at page 37) that in deciding whether the Department had been in breach of its "duty of maintain all roads" under Article 8(1) of the Roads (NI) Order 1980 (which is identical to Article 8(1) of the 1993 Order) the Court should approach the issue in the light of the principles enunciated by Steyn LJ in Mills v Barnsley Metropolitan Borough Council (Unreported, 7 February 1992). Recasting the principle germane to the instant case in the form of a question produces the following:

> "Was the highway in such condition that it was dangerous to … 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?"

In my view there is no material difference between this test and that which Girvan J identified and sought to apply in Keenan's case.

[18] I have come to the following conclusions:

(a) The plaintiff tripped and fell as she crossed Main Street, Portglenone on the day in question.

(b) She tripped because her foot caught on the vertical face on the carriageway side of a kerbstone which was one of a line of kerbstones differentiating the carriageway from the adjacent lay-by.

(c) The kerbstone in question was that identified to Mr Burnside by the plaintiff's husband and measured and photographed by him.

(d) As I have already said, the height of the exposed vertical face was between 25 and 30mm.

(e) The exposure of the vertical face to the extent indicated was caused by the gradual erosion of the carriageway over time.

(f) The vertical faces of the adjacent kerbstones were either not exposed or exposed to a minimal degree.

(g) The road at the location in question was out of repair.

(h) A reasonable person, taking all relevant factors into account, would have concluded that there was a reasonable chance that someone crossing the road might have been injured by tripping on the exposed face of the kerbstone.

(i) The hypothetical reasonable person, to whom I have referred, would take into account the fact that elderly people might cross the road at the material place from time to time, that people crossing the carriageway in the direction of the lay-by might be distracted by vehicular traffic and that as people made their way across the road the kerb line might be obscured by traffic thereby reducing their opportunity accurately to observe and judge the height of the face of the kerbstone in question above the eroded carriageway surface.

(j) Put another way, at all material times the exposed vertical face of the kerbstone was dangerous to pedestrians in the sense that in the ordinary course of human affairs danger might reasonably have been anticipated from the continued use by the public of the carriageway at the relevant place, that is to say in crossing there.

(k) Accordingly the plaintiff has established a breach of Article 8(1) of the 1993 Order.

[19] To the above I would add the following. First, my conclusions do not imply that every vertical face of 25-30mm on this sort of kerbstone at this kind of location constitutes a breach of Article 8(1). For one thing, such a kerbstone in its as built or as repaired condition could not be out of repair. For another, even if out of repair it might not be dangerous. Thus, a long line of

kerbstones with vertical faces of this or even a greater uniform height might so clearly signal to approaching pedestrians the extent to which the feet must be lifted that, even there was want of repair, no reasonable person would reasonably anticipate danger, any more than they would anticipate danger from the difference in level of 100mm or more which is a necessary incident of the widespread use of kerbstones to differentiate between the carriageway and the footway. This is not of course the instant case: here, as I have said, there was either no or minimal exposure of the vertical faces of the adjacent kerbstones so that the danger area extended no farther than the length of one kerbstone, or even less. Thus, there would have been no clear signal to a person crossing the road that there was a trip or higher step that had to be negotiated.

[20] Secondly, although I must compliment Mr McKay, the Section Engineer, for his faithful implementation of the defendant's maintenance policy and for his clear exposition of it when he was in the witness box, it seems to me that, in one important respect, that policy smacks of the sort of "mechanical jurisprudence" discouraged by Steyn LJ in Mills v Barnsley Metropolitan Borough Council (op cit) and deprecated by the Court of Appeal in Frazer's case (op cit page 38) and Girvan J in Keenan's case (op cit at page 348). Mr McKay explained to me that the policy applies only to abrupt changes of level in particular surfaces. Thus, for example, an inspector such as Mr McHugh will look for and measure a change in level between two flagstones on the pavement or an edge resulting from damage or deterioration in the asphalt surface of the carriageway but will ignore a change in level caused by damage or deterioration at the juxtaposition between a kerbstone and the carriageway. While accepting that as far as what might be called ordinary or high kerbs are concerned such changes may have little or no significance this may not be the case where the kerbstones are of the type and in the kind of position under consideration in this action and, as I have found, was not the case here.

[21] More specifically, I cannot see the logic of distinguishing between changes of level in particular surfaces caused by damage or deterioration and changes in level between different surfaces caused by damage or deterioration. If a trip between two adjacent flagstones is dangerous or an edge forming part of the perimeter of a pothole is dangerous I cannot see how, all things being equal, an equivalent trip or edge caused by damage or deterioration at the point were two different surfaces meet may not be just as dangerous (assuming, in each case, that one has applied the correct test). The distinction cannot be that only one of the surfaces is in a damaged or deteriorated condition as the appearance of abrupt changes in level in particular surfaces will almost invariably involve one part of that surface remaining substantially stable and intact.

[22] Thirdly, and this is connected with my second point, above, the policy as applied in the instant case seems to me to add weight to my conclusion that the road was dangerous in the requisite sense. As I have already said, in June 2002 Mr McHugh, the road maintenance observer, found a trip of 23mm in depth in the asphalt adjacent to where the plaintiff tripped and fell. This triggered reinstatement work which was carried out with commendable speed. At that time, and very close by, there was another trip, the one that caused the plaintiff's fall, which was of even greater height, perhaps even higher than the 25-30mm at the date of the accident. I say this because it is implicit in Mr McHugh's evidence that there must have been further deterioration in the carriageway between the accident in July 2001 and his material inspection in June 2002. Yet, by reason of the "mechanical" nature of the application of the defendant's policy, that trip had to be ignored even though, in my opinion, it was much more significant than the trip in the asphalt. This is because the pedestrian traffic across the road would surely have been much greater than that passing along the kerb line. In the particular circumstances the identification and repair of the one and the ignoring of the other simply makes no sense.

[23] Mr Paul Lewis of counsel, who appeared for the defendant, accepted, in my view correctly, that in the circumstances of this case a finding by me that the defendant was in breach of Article 8(1) of the 1993 Order would inevitably preclude the defendant from being able to rely on the statutory defence provided for in Article 8(2)(a). Accordingly, it is not necessary for me to make any comment on that provision.

[24] The plaintiff sustained a very nasty laceration to her left knee. She required an operation to deal with it. She was in hospital for 4 days. She has been left with an ugly 19cm scar and a pre-patellar bursa which may require surgery in the future. Her knee was already arthritic and this has been exacerbated by the accident. The accident was particularly distressing and upsetting for a person of her age and condition and it has had a permanent affect on her. I award her general damages of £25,000.

[25] In conclusion may I thank counsel for their highly professional presentation of their respective cases and arguments.