Neutral Citation No. [2010] NIQB 52 | *Ref:* **GIL7820**

Judgment: approved by the Court for handing down | *Delivered:* **20/4/10**
*(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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BETWEEN:

ULSTERBUS LIMITED

Plaintiff/Appellant;

-and-

JOHN SUFFERIN

Defendant/Respondent.

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GILLEN J

Application

[1] This is an appeal by the plaintiff (the appellant) against the decision on liability made by the District Judge at Ballymena Courthouse on Tuesday 10 February 2009 when he dismissed the plaintiff's claim for damages sustained by the plaintiff by reason of the negligence and nuisance of the defendant in and about the inspection, maintenance and cutting back of trees on his property at 10 Ardmore Road, Crumlin ("the location") on 6 December 2006 (the date).

Background

[2] The basic facts in this case were largely uncontested. On the date, a double decker bus carrying children collided with the overhanging branch of a tree belonging to the defendant at approximately 4.30 pm on a dark wet windy evening. Damage was caused to the bus with some personal injury to passengers. The damages to the vehicle in this case had been agreed. Only liability was at issue.

[3] I heard evidence from Mr Campbell the driver of the bus, Mr McCauley the District Controller in Lisburn responsible for this area, Inspector Stewart who had carried out a survey along this route prior to the accident, Mr McBratney, a landscape gardener who had performed certain works on the tree in question prior to the accident and the defendant .

[4] Mr Campbell had driven a double decker bus - approximately 8 feet wide and 14 feet high - on this route past the defendant's location between September 2006 (when double decker buses had been introduced on this route) and the date of the accident on perhaps ten occasions. Prior to the accident he had never found any cause for concern with the defendant's tree and so far as he was aware neither had any of his colleagues when driving that route. The route was travelled once a day every day Monday-Friday for this period. On the date, Mr Campbell indicated that as he approached the bend on which the defendant's house and the tree in question were located, a white van approached him causing him to move slightly to his left to ensure both vehicles could pass each other safely. This involved him driving on an area of tarmacadam/overlaid gravel adjacent to a wall surrounding the defendant's house. He was unaware of his vehicle contacting a branch other than hearing the normal brush of branches striking the top of his bus, a sound which he hears quite often on country roads. However subsequent to passing the defendant's house he was informed by one of the children on the bus that glass had been broken at the top of the bus and minor injuries had been caused to some children. 2/3 days after the accident he returned to the scene and saw that a branch had been broken off.

[5] Mr McCauley gave evidence that when the decision was taken in September 2006 to introduce double decker buses on this route, he had instructed Inspector Stewart, along with another driver, to travel the route in such a vehicle looking for "hazards or anything that would cause problems on the route". Inspector Stewart reported back to him that there were some branches overhanging the route which constituted potential hazards. This information was passed on to the property department/maintenance department who in turn contacted Mr McBratney to carry out work in this regard. On a second trip Inspector Stewart and Mr McBratney drove the route and Mr McBratney, upstairs on the bus, made a note of branches that were causing obstruction albeit he could not recall this property in particular.

[6] 3 or 4 days later, Mr McBratney returned and carried out the work in question with various saws and cutters. During the course of the work at the defendant's tree, which involved cutting off certain branches, the defendant had assisted him in making available a field opposite for the debris. Mr McBratney indicated that after he had carried out the work he saw nothing that was dangerous and he felt that his task of clearing any branches that would obstruct the buses had been completed.

[7] Subsequent to Mr McBratney carrying out the work, a further "dummy run" was carried out by the plaintiff to ensure the hazards had been removed and Mr McBratney had carried out the work in question appropriately.

[8] Mr Sufferin, the defendant, gave evidence that he had lived all his life in this house since 1967 and his family had acquired it in 1952. He did not believe that any obstruction was present either before or after the work on the tree was carried out. He did not inspect the tree after Mr McBratney's intervention but accepted that the work had been properly carried out.

Legal principles governing this case

[9] The basic principle governing the issues in this case is that the duty of an occupier owning trees projecting over or into the highway is based on reasonable foreseeability of harm. Thus in British Road Services v Slater (1964) 1 WLR 498 (Slater's case) a plaintiff failed where the driver of its vehicle struck the branch of a tree when he pulled into his nearside to enable an oncoming vehicle to pass. The tree in question had grown before the defendants had possessed the land on which the tree was situated. In that case neither the defendant nor the highway authority nor the plaintiff's driver, who had frequently passed along the road, had ever considered the branch to be a hazard.

[10] The court held that the branch had only become a nuisance because of the fortuitous meeting of two heavy lorries in the dark at the point where it came over the road and, in the circumstances, the defendants, who had not created it, could not be presumed to know of the nuisance so as to be liable for continuing it. The plaintiff's claim failed notwithstanding that the bough of the tree did prevent the convenient use of the highway and was a nuisance.

[11] Mr McCann, who appeared on behalf of the appellant, drew my attention to Dymond v Pearce (1972) 1 QB 496 (Dymond's case) which he submitted was authority for the proposition that cases of nuisances connected with the highway had received special treatment by the judges because of the public interest involved in the safe use of highways. In relation to obstructions on the highway amounting to a public nuisance and causing particular harm to the claimant it has been held that the defendant may be liable notwithstanding there is no foreseeable danger (see Clerk and Lindsell on Torts 19th Edition at paragraph 20-43).

[12] In Dymond's case Stephenson LJ spoke of the unauthorised parking of a vehicle in obstruction of the highway in these terms:

> "In the present state of the authorities was prima facie a nuisance actionable at the suit of the person injured by it (whether foreseeably dangerous or not at the

> time when it was created), because it was not justified by any right to park it there and the lorry driver as a user of the highway or as an occupier of adjoining premises or in any other capacity."

[13] Stephenson LJ went on to cite and adopt when Denning LJ had said in Morton v Wheeler 31 January, 1956, C.A:

> "If the state of affairs is such as to be a danger to persons using the highway … it is a public nuisance. Once it is held to be a danger, the person who created it is liable unless he can show sufficient justification or excuse."

[14] In my view Dymond's case does not dilute the general principle set out in Slater's case that the duty of an occupier of land on which a tree projects over the highway is still based on reasonable foreseeability. Sufficient justification or excuse can be found in accordance with Dymond's case provided the landowner justifiably has a right to have his tree where it is on his land and has not become aware of the risk or could with reasonable care have become aware of the danger which is posed.

Conclusion

[15] I have concluded that the defendant in this case was not aware of the risk or should not have become aware with reasonable care of any danger posed by the branch with which the bus collided. I have come to this conclusion for the following reasons.

[16] First, the driver of the bus had followed this route on several occasions prior to the accident in a double decker bus and had never encountered any difficulty or danger. Moreover his fellow drivers had similarly never encountered such a danger.

[17] Secondly, Inspector Stewart and Mr McBratney had specifically travelled the route and carried out works with the specific intention of removing any danger. Both of them considered that the work had been properly carried out, that any danger had been removed and that the tree was wholly safe for traffic to pass thereby. Indeed but for the fortuitous meeting of the bus and the van no danger would have been thought to exist

[18] The defendant himself had viewed the work being carried out, had been aware that specific steps were being taken to remove any danger, and in my view was therefore perfectly entitled to be satisfied that he had neither inherited or acquired any property where there was now a risk of danger. I do not believe that he failed to exercise reasonable care or that he could have

become aware of the danger which apparently this bough posed. He had ample justification or excuse for allowing this tree to remain as it was and that any obstruction which it had previously presented had now been removed. I find no reason why he should have thought that the tree continued to obstruct the highway.

[19] In all the circumstances therefore I affirm the decision of the District Judge and dismiss the appeal with costs to the respondent.