



Neutral Citation Number: [2019] EWHC 492 (QB)

Case No: C04LS472

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
ON APPEAL FROM HIS HONOUR JUDGE DAVEY QC
SITTING AT THE BRADFORD COUNTY COURT

Leeds Combined Court Centre
1 Oxford Row, Leeds LS1 3BG

Date: 5 March 2019

Before:

MR JUSTICE DINGEMANS

Between:

Miranda Walsh

Claimant and
Appellant

- and -

The Council of the Borough of Kirklees

Defendant and
Respondent

Ian Pennock (instructed by **Morrish Solicitors**) for the **Claimant and Appellant**
Andrew Howe (instructed by **Weightmans LLP**) for the **Defendant and Respondent**

Hearing date: 27 February 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE DINGEMANS

Mr Justice Dingemans:

Introduction

1. On 24 November 2013 Miranda Walsh was riding her mountain bicycle on the Bay Horse roundabout having travelled down the A640 New Hey Road, Huddersfield. Ms Walsh was following her partner, Mr Quashie, who was also bicycling, on to the roundabout. Ms Walsh felt a thud as her front wheel hit a pothole which caused her to lose control and fall off her bicycle. Ms Walsh suffered a comminuted fracture of her right leg with severe displacement. The Council of the Borough of Kirklees (“the council”) is the highways authority for the roundabout.
2. Ms Walsh brought a claim against the council for breach of statutory duty pursuant to the provisions of section 41 of the Highway Act 1980 (“1980 Act”). The claim was defended on the basis that Ms Walsh had slipped off her bicycle and that, in any event, the pothole was not dangerous. It was common ground that the council was unable to rely on the special defence under section 58 of the 1980 Act because although there had been regular inspections before the accident these had continued after the accident and none of the inspectors had reported a defect. Therefore if, contrary to the council’s case, the pothole was dangerous, the inspections must have failed to “take such care as in all the circumstances of the case was reasonably required” because the inspectors had not considered it to be dangerous.
3. Ms Walsh’s claim against the council was dismissed by His Honour Judge Davey QC (“the judge”) in a judgment dated 15 August 2018, following a two day hearing on 14th and 15th August 2018. For the detailed reasons set out in paragraphs 5 to 20 of his judgment the judge found that Ms Walsh had hit a pothole and fallen from her bicycle and suffered injuries. However the claim was dismissed. This was because the judge held that “there is in my judgment simply not enough reliable evidence of the dimensions or conditions of the pothole for me to say it is more likely than not that it presented a real source of danger in the sense identified in *Mills v Barnsley Metropolitan Borough Council*”.

Issues

4. Ms Walsh appeals on the basis that the judge was wrong to find that he could not determine the length and width of the pothole in circumstances where there was a photograph with a tape measure over the pothole so that its dimensions could be determined. Mr Pennock, on behalf of Ms Walsh, submits that the judge was simply wrong to say that there was not enough evidence to find reliable evidence of the dimensions or conditions of the pothole because the tape measure in the photograph showed that the dimensions could be measured at a width of 150 mm (6 inches) and a length of 200 mm (8 inches) with an admitted depth of 40 mm. Mr Howe, on behalf of the council, submits that a careful examination of the photographs shows that the judge was right to find that the width and length could not be measured and that Mr Pennock is ignoring what the photograph shows about the road material in the middle of what Mr Pennock says is the hole.

The evidence about the pothole and the findings made by the judge

5. The pothole was located in the 6 o'clock position (assuming an entry onto the roundabout from 6 o'clock) over halfway across the carriageway going around the roundabout. It was located within a yellow box with yellow diagonal lines designed to stop cars entering onto and blocking the roundabout. The pothole was visible on the roundabout, as appears from the photographs in the bundle. There was a cycle lane leading down to the roundabout and away from the second entrance. There were 4 roads leading onto and from the roundabout. It appears that Ms Walsh was intending to go around the roundabout to leave in the 3 o'clock position (assuming an entrance at 6 o'clock) explaining why she had gone further across the carriageway going around the roundabout to where the pothole was situated.
6. In the Particulars of Claim it was pleaded that the pothole was "at least 50 mm deep". A photograph was attached. The photograph showed part of a yellow line, but there was nothing which assisted for scale. It seems that the photograph was one of those taken by Mr Quashie, as appears below.
7. The defence pleaded that as at the time of repair on 17 July 2014 the pothole measured 100 mm by 150 wide and 40 mm deep, although that was amended at the trial to read 100 mm by 15 mm wide and 40 mm deep. The amendment was made because this was what Mr Donoghue, an engineer from the council's third party claims section, said in his witness statement had been reported to him about the measurements, as appears below.
8. Mr Quashie had taken photographs of the pothole about a couple of weeks after the accident, which meant that they would have been taken in late November or early December 2013. However the roundabout was so busy that Mr Quashie had to go back after dark, and was unable to produce measurements of the pothole. Mr Quashie's photographs were at pages 219 and 220 of the trial bundle. They showed a hole which appeared to be in a triangle shape. One of the photographs (at page 220) appeared to show the whole of the thickness of a yellow line but I was told that no attempts had been made at trial to determine the thickness of the yellow line and use that thickness to attempt to work out the dimensions of the pothole, and given the obvious limitations of the photograph that approach was understandable. Mr Quashie said that he could see the base layer of the pothole, which would give a depth of at least 45 mm. The judge held that the photographs were "virtually meaningless when assessing the level danger involved" at paragraph 22 of the judgment.
9. There was evidence of inspections by highway inspectors both before and after the accident. None of those inspectors reported the pothole as dangerous or requiring repair before notice of the claim made on behalf of Ms Walsh was given. The last inspection before the accident had been a two man driven inspection of the roundabout on 17 November 2013, some 7 days before the accident.
10. On 8 July 2014 Mr Donoghue visited the scene and took photographs appearing at pages 151 and 152 of the trial bundle, enlarged copies of which were at pages 257 and 258 of the trial bundle, repeated at pages 303 and 304 of the trial bundle. Mr Donoghue had, because of safety concerns, placed a tape measure on the road and photographed it. The tape measure runs from 1 to 10 inches and is placed across the width of the pothole.

11. It is apparent that there was extensive questioning about these photographs at the trial. In the course of his evidence Mr Quashie marked the photograph at page 151 to show where he thought the base layer was in the pothole. He had done that with a green highlighter, and at the hearing of the appeal it was apparent that I had been given the trial bundles used by the witnesses which showed Mr Quashie's original marking (copies were made of that marked photograph by both parties at the conclusion of the appeal). This showed green highlighting to the top edge of the pothole and to the top and right of what appears to be a piece of road material in the part of the pothole nearest to the roundabout.
12. As to width Mr Pennock submitted that the photograph at page 151 shows a pothole with a left hand edge beginning at 4 inches on the tape measure and ending at 8 inches curving out to 9 inches, meaning a width of between 100 and 125 mm. Mr Howe submitted that the edge could not be said to begin until 5 inches on the tape measure, and Mr Pennock said that there was at least a slope between inches 4 and 5. Mr Howe said that between inches 5 and 8 there is road material underneath the tape measure, and it is impossible to know what, if any, depth is shown for that material, meaning that it is impossible to measure the width. Mr Pennock said that there was a dip down and that the bottom of any pothole would undulate.
13. As to length Mr Pennock submitted that scaling off the tape measure (which shows inches) showed that the length from bottom to top of the pothole was 8 inches, being some 200 mm. Mr Howe submitted that the length of the pothole could not be said to be 8 inches. This was because there was road material towards that part of the relevant area nearest to the entrance to the roundabout, whose depth, if any, from the road surface was impossible to determine, which was next to the road material underneath the tape measure which extended up to the part of the pothole area nearest to the roundabout whose depth, if any, below the road surface was again impossible to determine.
14. As to depth Mr Pennock relied on the admission as to depth of the pothole at the time of the repair on 17 July 2014 as 40 mm deep and noted that both parties did not suggest that there had been any material change in the pothole after the accident and before repair. Mr Pennock submitted that pothole was the size of a dinner plate, but Mr Howe noted that Mr Pennock had made that submission at trial and it had not been accepted.
15. The judge noted Mr Quashie's evidence about the depth and said at paragraph 24 of the judgment "all well and good so far, but even assuming that his best guess about depth is correct, that is of no help to the claimant unless the width of the pothole can also be established". The need to establish the width of the pothole part appeared from the fact that Mr Quashie had said in evidence that he "was surprised that the photographs that he had taken showed something which could cause someone to come off a mountain bike" given that the tyres on the mountain bike were 2 ½ inches wide.
16. At paragraphs 31 and 32 of the judgment the judge described the photographs taken by Mr Donoghue as "almost entirely useless". The judge said that "it is impossible to say from those two photographs ... what the width of the pothole is and Mr Donoghue told me – and I accept – that it was too dangerous when he was there on 8 July 2014 to attempt any more by way of accurate measurement. He did not think that the

pothole did represent a danger which needed repair, but to be on the safe side he ordered its repair anyway ...”.

17. The repair was carried out and Mr Whittam, the person carrying out the repair was instructed to photograph and measure the hole. However no photograph was taken but Mr Whittam came to Mr Donoghue and reported measurements of 100 mm long by 15 mm wide and 40 mm deep, according to the witness statement of Mr Donoghue. There was no note which was disclosed showing the measurements. Mr Donoghue thought that he had recorded the measurements on a post-it note and then destroyed it. Mr Donoghue thought that he had made an electronic note of the measurements but it had not been disclosed, Mr Donoghue assumed that this was because of privilege but it appeared that no note could not be located. The defence required to be amended because that had pleaded that the measurements were 100 mm long by 150 mm wide and 40 mm deep. Mr Whittam was not called and the evidence of the measurements was hearsay. The judge attached no weight to the hearsay evidence given the circumstances in which it had been communicated and the absence of any reliable record of the measurements.
18. There was also evidence at trial from Daniel Smith and Ann Ismay, highway inspectors employed by the council. The judge accepted their evidence saying that they “both impressed me as well trained, highly experienced, professional, careful, thorough and honest”. The judge recorded that Mr Smith had carried out the inspection on 17 November 2013 and “noted nothing to report by way of potential danger. Ms Ismay has inspected the roundabout several times ... and she too never noted anything to report.”
19. The judge recorded that Mr Smith, Ms Ismay and Mr Daniel considered that there was a minor area of damage which was not such as to require repair. The judge specifically noted that the repair carried out by Mr Daniel was not an acknowledgment of danger. The judge went on to hold “the professional opinion of Mr Smith and Ms Ismay is backed up by records produced by the defendants which show the long period for which inspections were carried out monthly, regularly month in and month out before and after the index accident by a range of different inspectors, none of whom identified the pothole as being dangerous such that it required repair. The records also show that no complaint was ever received from the public or the emergency services or anyone else to the effect that it was or might be a danger”.
20. Having made these findings of fact the judge said “in the result, having heard and read the evidence presented before me there is in my judgment simply not enough reliable evidence of the dimensions or condition of the pothole for me to say that it is more likely than not that it presented a real source of danger identified by the Court of Appeal in *Mills v Barnsley Metropolitan Borough Council*. Accordingly the claimant fails to discharge the burden of proof”.

Relevant legal principles for showing a breach of duty under section 40 of the 1980 Act

21. There was some discussion about the relevant legal principles relating to the 1980 Act. In the event it became common ground that a claimant is required to prove that:
(a) the highway was in such a condition that it was dangerous to traffic or pedestrians;

(b) the dangerous condition was created by the failure to maintain or repair the highway; and (c) the injury or damage resulted from such a failure. This is sometimes referred to as “an actionable defect”. If an actionable defect is proved, the highway authority may attempt to prove a special defence under section 58(1) of the 1980 Act.

22. In relation to the issue of dangerousness to traffic or pedestrians the authorities establish that it must be the sort of danger which an authority might reasonably be expected to guard against. There was some discussion about the judgments in *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR P291 and *Rider v Rider and another* [1973] QB 505, which cited with approval part of the judgment of Denning LJ in *Morton v Wheeler* 31 January 1956, but the relevant legal test to be applied remained common ground and there was no misdirection by the judge about the legal tests to be applied.

Legal principles to be applied by appellate courts when reviewing findings of fact

23. It is well-established that appellate courts have to be very cautious in overturning findings of fact made by a trial judge, see *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. This is because trial judges have seen witnesses and take into account the whole “sea” of the evidence, rather than indulge in impermissible “island hopping”, and because duplication of effort on appeal is undesirable and will increase costs and delay, see *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] ETMR 26.
24. Further appellate courts will only interfere if the trial judge was plainly wrong, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600. This means making a finding of fact which had no basis in the evidence or, particularly relevant to this appeal, showing a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence so that the decision cannot reasonably be explained or justified.

Judge entitled to dismiss claim

25. I accept that if the judge had failed to make use of measurements which could be taken from photographs before the Court then the appeal would succeed because there would have been either a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence.
26. At one stage, after a quick look at the photographs taken by Mr Donoghue, I was attracted by the proposition that measurements as to width and length were there to be seen from the photographs. However, having had the benefit of the excellent submissions from both Mr Pennock and Mr Howe, and the opportunity to look again at the photographs taken by Mr Donoghue in the light of those submissions and to read again the judgment of the judge, I have come to the conclusion that the judge was right to find that “there was not enough reliable evidence of the dimensions or condition of the pothole to say it was it is more likely than not that it presented a real source of danger”. This is because it is not possible to determine what effect the road material underneath the tape measure, together with the road material in that part of the relevant area nearest to the roundabout, had on the measurements of the pothole, either using the photographs at page 151 and 152 of the trial bundle, or the enlarged copies of the same photographs at pages 303 and 304 of the trial bundle.

27. It is apparent that the judge took careful note of all the relevant evidence and placed considerable reliance on the evidence of the inspectors when making the finding of fact that Ms Walsh had not proved that the pothole presented a relevant danger. All of this was a question of fact for the judge. There was, in my judgment, no justiciable error of approach which would permit me to set aside the finding that was made by the judge.

Conclusion

28. For the detailed reasons given above I therefore dismiss the appeal.