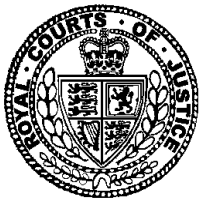

Neutral Citation Number: [2021] EWHC 2917 (QB)

Case No: QB-2020-001156

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2021

Before:

HER HONOUR JUDGE CRANE

- -

Between:

OONAGH MURPHY	**Claimant**
- and -	
(1) MILTON KEYNES PARKS TRUST LTD	**Defendants**
(2) MILTON KEYNES COUNCIL	

- -

- -

Sinclair Cramsie (instructed by **OH Parsons LLP**) for the **Claimant**
Thomas Banks (instructed by **Clyde & Co.**) for the **First Defendant**
Jack Harding (instructed by **DWF LLP**) for the **Second Defendant**

Hearing dates: 1 November 2021

- -

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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HER HONOUR JUDGE CRANE

HER HONOUR JUDGE CRANE:

Background

1. This case concerns an accident on 30.03.17, when the Claimant, then aged 64yr old, stumbled and fell. She had purchased a newspaper from a shop on Springfield Boulevard and was walking back across the forecourt to her car when she fell.

2. The first defendant is the owner/occupier of the shop forecourt.

3. The second defendant is the highway authority for Springfield Boulevard, which runs adjacent to the shop forecourt, referred to as the pavement.

4. The claim was issued on 23.03.20.

5. There is no dispute that the claimant fell and injured herself. It was a nasty fall for which anyone would feel great sympathy for her.

6. Both defendants deny liability.

7. This trial was heard on 18&19.10.21 and was solely concerned with liability.

The Law

8. There is no dispute that the first defendant is the occupier of the forecourt for the purposes of the Occupier's Liability Act 1957. As the occupier it owed a common duty of care under section 2 of the Act:

Extent of occupier's ordinary duty

> "*(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise."*
>
> *(2) The common duty of care is 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.*
>
> *(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—*
>
> *(a) an occupier must be prepared for children to be less careful than adults; and*
>
> *(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any*

> *special risks ordinarily incident to it, so far as the occupier leaves him free to do so.*
>
> *(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances,…..*
>
> *(5) ……*
>
> *(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.*"

9. In *Beaton v Devon County Council [2002] EWCA Civ 1675*, Judge LJ, criticised the Recorder for appearing to indicate that the duty was to ensure that an accident did not happen. The test is whether the occupier had done all that was reasonably required to ensure that the visitor was reasonably safe.

10. There is no dispute that the second defendant is the highway authority responsible for the pavement, pursuant to section 41 of the Highways Act 1980:

> "*(1) The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty, subject to subsections (2) and (4) below, to maintain the highway*."

11. Section 41 does not provide for the standard of maintenance. It is agreed that the standard is whether the highway is dangerous.

12. This standard was articulated by Laws LJ, in *Jones v Rhondda Cynon Taff CBC [2009] RTR 13*, at paras 11 and 12:

> "*Section 41 has been said to impose an absolute duty, but the term ''absolute'' in my opinion has with respect to be treated with care. There is a risk of it suggesting that the duty is to maintain the highway to such a standard as in effect to guarantee the safety of its users, and it is plain that that is by no means the measure of the duty; it is absolute only in the sense that it is not merely a duty to take reasonable care but to maintain the highway to an objective standard. The statute does not state what the standard is. The authorities, however, are as it seems to me clear as to the nature of this standard. The highway has to be maintained in such a state of repair that it is reasonably passable for the ordinary traffic of the neighbourhood without danger caused by its physical condition….*
> *Foreseeability of harm will not of itself entail the conclusion that the highway is unsafe. As Lloyd L.J. said in James v Preseli Pembrokeshire District Council [1993] PIQR 114 at*

> *119: ''In one sense it is reasonably foreseeable that any defect in the highway, however slight, may cause an injury but that is not the test of what is meant by dangerous in this context. It must be the sort of danger which an authority may reasonably be expected to guard against".*

13. "In *Gorringe v Calderdale (2004) 1 WLR 1057*, Lord Hoffman said, at para 10:

> "a highway authority is not of course the occupier of the highway and does not owe the common duty of care. Its duties….have for centuries been more narrowly defined, both by common law and statute."

14. As Lord Steyn said, at p295, in *Mills v Barnsley Metropolitan Borough Council (1992) PIQR 291:*

> "*in drawing the inference of dangerousness in this case, the judge impliedly set a standard which, if generally used in the thousands of tripping cases which come before the courts every year, would impose an unreasonable burden upon highway authorities in respect of minor depressions and holes in streets which in a less than perfect world the public must simply regard as a fact of life. It is important that our tort law should not impose unreasonably high standards, otherwise scarce resources would be diverted from situations where maintenance and repair of the highways is more urgently needed. This branch of the law of tort ought to represent a sensible balance or compromise between private and public interest. The judge's ruling in this case, if allowed to stand, would tilt the balance too far in favour of the woman who was unfortunately injured in this case. The risk was of a low order and the cost of remedying such minor defects all over the country would be enormous*."

Location and mechanism of the fall

15. The location of the fall was on Springfield Boulevard. There is a One Stop shop, with a large block paved forecourt, where cars can park. At the location is also a community centre, which has a nursery/children's play area, and sheltered accommodation for the elderly behind it. To one side of the forecourt is an area marked out with painted white lines and marked 'no parking', running down beside a wall, which it is agreed was intended as an area for pedestrians. The forecourt slopes down towards the pavement. The forecourt is adjacent to the pavement, which is also block paved.

16. It is accepted by all parties that the whole range of types of people, including children and elderly people, would use this area. It is accepted that it is a busy area, outside a local shop and community centre.

17. The boundary between the areas of responsibility of D1 (the forecourt) and D2 (the pavement) is the outer edge of the white painted line. The white line being on D1's forecourt.

18. The exact location of the fall is important as it is relevant to which defendant, or both, might be liable. Also as Lloyd LJ said in *James v Preseli Pembrokeshire District Council (1992) PIQR 114*, Lloyd LJ:

> "*The question in each case is whether the particular spot where the plaintiff tripped or fell was dangerous….But if the particular spot was not dangerous, then it is irrelevant that there were other spots nearby that were dangerous or that the area as a whole was due for resurfacing*."

19. The claimant's case, until the day of trial, was that she had tripped/stumbled when placing her foot in a depression in the surface of the forecourt/pavement, which caused her to stumble and fall. This was set out in:

a) Particulars of claim [B1-18 – paragraph 3];

b) Reply to the defence [B1-35] and marked on photographs [B1-37&38];

c) Her witness statement, dated 11.07.21 [B1-52/&52 – para 9];

20. At the trial, the claimant gave evidence and her account of the fall had changed. She said that she had tripped, catching her left foot, on uneven or broken paving just near the letter 'G' of the painted word 'parking' [See B1-64 photograph], where one can see two darker areas. This caused her to stumble, and as she put her other foot down, that was in the depression, so she continued to stumble and then fell. She ended up lying on the ground facing the wall which runs along the boundary between D1 and D2 land. She conceded that it had been a long time since the accident and it is very hard to know exactly what had happened. She could not explain why this version had not been set out in her witness statement.

21. At B2-32&33 are two photographs with red circles at both the depression and the areas by 'G'. These photographs are not attached to any statement and undated, but are part of the disclosure. The claimant said that she had put both of the red circles on the photograph.

22. No one else witnessed the fall.

23. The claimant's husband only saw the aftermath of the fall and the claimant lying on the ground. His evidence was inconsistent regarding where she was lying and did not assist me.

24. All the measurements taken on behalf of all parties were of the depression. No one took any measurements of the area by the letter 'G' as this had never been part of the claimant's case prior to trial. Andrew Hill, a chartered civil engineer, who carried out measurements of the depression for the claimant, gave evidence that he had been told that the fall was at the area of the depression. He had not been told of any other area or he would have measured that.

25. I found the claimant to be an honest witness seeking to give an accurate account of the fall. However, as she conceded, the accident was a long time ago and was difficult for her to know exactly what happened given the shock of such an unexpected and quick event. It had never been her case prior to the day of trial that the area by 'G' was significant. I did not consider it credible that the claimant had marked the photographs at B2-32&33 and even if she had they had not been attached to her statement or formed part of her case about the mechanism and location of the accident prior to the day of trial. I am satisfied on the balance of probabilities that she did not trip/stumble around 'G' but stumbled when stepping into the area of the depression, around the white line, which caused her to fall.

26. I should further note here that on behalf of the claimant it was accepted that even if she had tripped around the letter 'G' there was no actionable defect to the paving at that location.

The Depression

27. What is the evidence about the depression where the claimant fell?

28. There are photographs of the location taken on the following dates:

a) August 2012 – Google street view – B2-428-429.

b) 20.05.17 – Taken by the claimant's solicitor - B1-59, 82-84, 86-87; B2-5-19.

c) 24.05.17 – Taken by Michael Murphy, the claimant's husband, and Martin Maloney - B1 – 61-64, 89-90, 103 & 105; B2-20-31.

d) 23.04.18 – Photographs showing sand at the location - B1-66-72, 92-98; B2-34-40.

e) 09.11.18 – Taken by Andrew Hill – B1-111&112.

f) 26.03.21 – Taken by Christopher Fripp – B1-202-210.

g) Undated photographs B2-32-33.

29. The Google street view, from August 2012, show a depression at the relevant location. It is not possible to deduce if the depth of the depression is the same as at the time of the claimant's fall but it looks to be in much the same condition as later photographs.

30. Michael Murry and Martin Maloney measured the depression on 24.05.17. There are no details of the length of the ruler used to measure the depression, but the depression is shown in the photographs as 40mm deep [B2-22] or in slightly blurred photographs [B2-20&22] as nearer 35mm deep.

31. The significance of the photographs on 23.04.18 is that the claimant says there were repairs done at the location. The claimant submits this would then be relevant to the validity of the record keeping of the defendants and also to whether any measurements taken after that date reflect the accurate position at the time of the accident. The claimant says she was told that by the shop keeper that repairs had been

done the previous week. However, little, if any, weight can be attached to this hearsay. Both D1 and D2 denied that any repairs had taken place.

32. Ben Allott, Head of Property for D1 since 2015, gave credible and reliable evidence that no repairs had taken place at the location since 2015.

33. Christopher Fripp, Highway Inspector for Ringway the maintenance contractor for Milton Keynes since April 2014 until his employment by Milton Keynes Council in January 2021, gave credible evidence that the sand seen in the photographs was not what would be observed after a repair. If a repair had been carried out it would require a permit and be recorded on the system so the contractor could be paid. There was no such permit applied for or granted and no record of any such repairs.

34. When examining some of the photographs, such as B1-63 [24.05.17], there is a darker area on the second block along on the pavement, which could simply be dirt or could be damage. The photographs taken on 23.04.18 show an undamaged block. However, when one examines all the photographs, such as at B2-30 taken on 24.05.17, the block does not appear darker or broken. So the photographs do not show any changes to any of the blocks since the time of the accident. The only change being some sand is seen.

35. I found the evidence of Ben Allott and Christopher Fripp about the lack of repair to be both honest and credible evidence. This is supported by the photographs which show no change to the blocks and a depression still remaining. I am satisfied that no repair has been done at the location since the accident.

36. Andrew Hill, a chartered civil engineer, measured the depression on 09.11.18. He used a 1.2m spirit level across the depression and found a maximum depth of 27mm. The depression varied from 15-20mm to 27mm, over an area 500mm to 700mm in diameter.

37. Christopher Fripp took measurements on 26.03.21. He found no sharp edges such as someone might trip over. He used a 300m long ruler and found a depression of 11-12mm depth. He used a 600mm ruler and found a depression of 17-19mm. He considered the gradient which he found to be 1 in 15, shallower than that on new drop kerb crossings across the borough.

38. Unlike a sharp edged trip hazard, it is more difficult to exactly measure a depression. It makes a difference at what point in the depression one measures the depth, the positioning of the ruler across the depression, and also the length of any ruler placed across the depression, particularly in this case where there is a slope running down to the depression. It is important to consider if the measurement is really measuring the depression or merely just a continuation of a slope.

39. I am satisfied that there is a depression. Whilst it is difficult to make an exact finding, I am satisfied on the balance of probabilities, considering the evidence of Andrew Hill and Christopher Fripp, that the depression is a maximum of 27mm in depth over a minimum diameter of 500mm.

Other factors relevant to liability

40. Ben Allott accepted that there was a slight depression but did not consider it was significant or require any intervention, particularly as it was smooth depression over a long distance with no sharp edge.

41. Christopher Fripp and Andrew Dickinson, Strategic Asset Manger for Highways with D2, gave evidence about the Milton Keynes Code of Practice for Highway Safety Inspections January 2017. The guidance details at p28 [B1-180] that *'A depression will be identified as an actionable defect when it is 40mm or more in depth and has a maximum horizontal measurement less than 300mm.'* Andrew Dickinson could not identify the origin of those figures other than to confirm it was not in national guidance and had been in previous Milton Keynes documents prior to his involvement and brought forward into the current code. He also emphasised that this is only guidance for inspectors and they are expected to use their judgment to take account of all factors when considering if a defect is actionable.

42. Neither the views of these witnesses nor the guidance is determinative of the liability. However, the evidence of an experienced property manager and experience highway inspectors are relevant, as is the local guidance for highway inspectors.

43. Of relevance, but not determinative, to liability is also whether there have been previous accidents or problems caused at the location of the accident.

44. Ben Allott said if a complaint had been made it would have come to him and his team. There had been no complaints about this area since 2015. I found his evidence to be reliable and credible.

45. Christopher Fripp gave evidence about and exhibited inspection records. They recorded 12 monthly inspections of the area. If there was a complaint to D2, this would result in an ad hoc inspection. There were no ad hoc inspections relating to the area of the claimant's fall. I found this evidence to be credible and reliable.

46. The claimant submitted that others may have tripped or fallen at the depression but not made a complaint. There is no evidential basis for that submission and it is mere speculation. There is no evidence to support any submission that this depression has resulted in any other trips or accidents prior to the claimants fall.

47. I am satisfied on the balance of probabilities that there have been no previous accidents at the location, despite there being a depression at the boundary of the forecourt/pavement since 2012.

Conclusion

48. The depression is not particularly significant, being only a maximum of 27mm in depth and a minimum of 500mm in diameter. This is significantly less than the Milton Keynes Code of Practice guidance for actionable defects. The gradient is less than would be found across drop kerbs across the borough.

49. The depression has existed since at least 2012. Despite this being a busy thoroughfare for the local community, with all kinds of pedestrians, including children and the elderly, there have been no other recorded accidents or falls at the location.

50. Neither D1 nor D2 are expected to maintain the forecourt or the pavement in a perfect condition, without any slightly raised edges or depressions. Such a high standard for either defendant would not be realistic or practicable.

51. The purpose for which the claimant was invited onto the forecourt was for commercial purposes to go to the One Stop Shop. In all the circumstances of this case the condition of the forecourt was reasonable to see that the claimant was reasonably safe when walking across the forecourt to the One Stop Shop and back to her car.

52. The pavement, that being the highway, was not dangerous. It was reasonably passable for the ordinary traffic, that being pedestrians moving to/from the forecourt to the pavement and along the pavement, without danger being caused by the condition of the pavement.

53. The claim is dismissed.