

TRANSCRIPT OF PROCEEDINGS

Ref: D74YM955

**IN THE CIVIL AND FAMILY JUSTICE CENTRE
AT CARDIFF**

2 Park Street
Cardiff

Before HIS HONOUR JUDGE HARRISON

IN THE MATTER OF

JOHN MICHAEL POWER

-v-

CARDIFF COUNCIL

MR SAM SHEPHERD appeared on behalf of the Claimant

MR BEN HANDY appeared on behalf of the Defendant

JUDGMENT

29th OCTOBER, 2018

(AMENDED AND APPROVED)

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JUDGE HARRISON

1. This is a claim for damages for personal injuries made by Mr John Power arising out of a tripping accident – or falling accident – that occurred on 5 May 2016 at about 15.30 in the afternoon. At the material time, he was making his way on a dog walk with his dog from his home at Daviot Street along a usual route that he took towards Ty-Draw Road in the city of Cardiff. It's his case that he was approaching an area where there is a tree, he saw a dog coming in the opposite direction. Being anxious about the reaction of his dog to what he described as a "yapping" dog, he decided to cross the road. As he crossed the road, he had to pass in the vicinity of a tree. At that point, he lost his footing, fell and sustained the injury about which he complains. The damages for those injuries have been agreed between the parties and so no decision needs to be made so far as that is concerned. The evidence in this case was provided from the claimant as to the factual circumstances of the accident. There is no other relevant witness.

2. The pleadings in this case are in familiar form, the claim being based upon a breach, primarily, of section 41 of the Highways Act 1980. The circumstances in which the accident occurred are as I have already summarised. The claimant in his statement described the circumstances of the accident and he confirmed the contents of that statement in his evidence before me today. The circumstances were not such as to cause the claimant immediate significant injury. It is clear in this case that he did not in the aftermath of the accident seek medical assistance. What he did do was contact solicitors relatively shortly afterwards and they went back to the scene and took photographs of the area, which are illustrated primarily in the bundle of documents at page 42. There are following pages which show a wider area of the scene in question and there are measurements taken of the disturbed area of tarmacadam in the vicinity of the area in question.

3. Relatively recently, further photographs were obtained by the defendants, which show the area as well. Those photographs were used for illustrative purposes in the course of giving the evidence. Using the photographs at page 42 and following, and the new photographs, the scene shows this: The scene shows a mature tree. A mature tree set into the pavement. The mature tree has a substantial root system. The root system spreads from the base of the tree, under, obviously, the surface of the surrounding pavement and probably road, but at certain points on the pavement, the roots have protruded through the surface of the pavement and are proud of the same. The photographs also illustrate that the roots have to some extent disturbed the surface of the tarmacadam so as to break up the same, and/or to leave the area in question at a different level to what I refer to as the "general surface" of the pavement.

4. The claimant in giving his evidence used one of the photographs produced more recently by the defendants to illustrate where he says his foot was caused to stumble and thereby cause him to fall. He marked the area with a cross. He described in his evidence and indeed in his statement, an action that didn't suggest that his foot came into contact with the root of the tree, or any part of the tree, and that had no part in him being caused to fall. It was, on his evidence, the difference in levels, illustrated the point in the photographs where he placed the cross, that caused him initially to lose his balance and to stumble forward and to fall and sustain his injury. He was, at the material time, walking

with a dog – a dog on his right hand side, I think. The dog indeed played no part in the mechanism by which the accident is alleged to have occurred.

5. Set against the evidence given by the claimant in his account today, there are certain documents that were put to him in cross-examination. The first and perhaps most immediately obvious document was the consequence of the contents of the medical report prepared in this case. That medical report sets out an account of the accident in which Mr Power, in or about December 2016, described to the medical expert Mr Singhor, an accident certainly in which he stumbles, but in which some reference is made to him having tripped on a cut stump of a tree, which had laid to raised concrete. That in itself may be a somewhat inaccurate description of events, since in no way can it be seen there is, in the circumstances of this case, the cut stump of a tree.

6. But perhaps of more relevance in this case are the contents of the claims notification documentation produced by the claimant’s solicitors and sent, having been signed electronically, on the 21 of July of 2016. That document appears in the bundle of documents at page 148. Within that document, there is a description of the accident in question. It appears at page 151. The description of the accident reads: “Please see the attached photographs. The claimant’s foot stumbles upon the edge of the broken tarmac as he was walking, causing him to catch his foot on the tree stump”. Looking at the photograph attached to the relevant claims notification form, we can see that appears at page 155 of the trial bundle. On that photograph, there are marked two arrows. The arrows suggest a direction of travel. The arrows suggest an area, so far as the accident is concerned, in terms of a contact with root and/or the location of the accident itself, which is somewhat closer to the tree than that which is suggested in the photograph produced – aptly suggested on the photograph marked by the claimant today in giving his evidence.

7. Looking overall at the nature of the description of the accident in this case, and insofar as it is necessary for the court to reach a conclusion on the balance of probabilities of precisely where the accident took place, it seems to me that the version of events as set out in the claims notification form, it having been made somewhat closer to the accident, is far more likely to be accurate than that which is now given by the claimant in terms of the particular location. I don’t think that’s an illustration in any way of the claimant being dishonest or trying to mislead me in terms of precisely what happened. Rather, there an inevitable element of going over and over matters of this sort in one’s mind and it seems to me that in so doing, the claimant has persuaded himself that the accident took place somewhat further away from the base of the tree than ultimately was the case, and it seems to me that looking at the photograph at page 155, the only possible explanation for the arrow shown on that is that this accident occurred because of a tripping incident that took place as a result of something between those two arrows. Precisely the mechanism of how anybody falls, analysing it so long after the event, is a difficult thing to do. Suffice to say that it seems to be the situation that the claimant lost his footing because of the unevenness – probably caught his foot against the protruding route and stumbled and fell over.

8. In the light of that finding, it is, it seems to me, still appropriate for the court to go on to consider the main issue between the parties in this case. That is to say, the appropriate analysis of the duty owed by the Highway Authority, pursuant to section 41 of the Highways Act of 1980. Before doing so, it is important to recognise that evidence was

also given in this case on behalf of the defendants from Mr Misbah. Mr Misbah was employed by the local authority at the material times and indeed went to the accident scene after the local authority had first been notified of its occurrence. In other words, sometime after July or in July 2016. Having gone to the area in question, he formed the view that that which he saw was not something that he would have caused a repair notification to be issued for, and there was no job note was issued as a consequence of his inspection. He took the view that that which he saw was something which is perhaps not unusual in areas of pavement where there are mature trees such as this.

9. In his statement, he makes the point that the area in question has been the subject of tarmacadam surfacing of the pavement rather than slabs, and the point is made that tarmacadam is rather more flexible than slabs. In addition to that, and in addition to the contents of his statement, recently produced documents which show that rather more recently – in other words, as a result of an inspection in September of this year, yellow markings have been placed on the surface of the pavement in the vicinity of this tree, and he explained what those yellow markings were. These, he explained, were not the markings of identification of a danger that required repairs to be undertaken promptly. Rather, they were what were described as category 3 identifications – namely, identifications that would place, potentially, those areas of unevenness into the general system of ongoing maintenance that might be undertaken by a local authority – and Highway Authority in particular, if funds were available to do so and if it could be placed within an appropriate improvements scheme.

10. Looking at the photographs taken more recently in September, and looking at those which were produced in 2016, there is, of course, a significant amount of similarity. There is a similarity between those two sets of photographs, and photographs which were taken in 2014, which were obtained by way of the assistance of Google Maps. They show a similar sort of area, a similar sort of route system at the base of a mature tree. It does, however, seem to me that there has been, if one looks at the more recent photographs, a general worsening of, in particular, the area of pavement between the mature tree and the dwarf wall which forms part of the other edge of the pavement and the edge of – curtilage of a residential property.

11. So, what this case illustrates is the difficulty presented by large, mature trees in the pavement of areas such as these – residential, albeit near to public parks. The appropriate legal basis for assessing the issues between the parties is, of course, well-travelled. The duty owed, pursuant to section 41 of the Highways Act 1980 was considered by Lord Justice Steyn in the case of *Mills v Barnsley Metropolitan Borough Council*, reported in 1992 PIQR 291. Lord Justice Steyn set out three matters that a plaintiff, as they were then called, must prove in order to be able to establish their case: “a) The highway was in such a condition that it was dangerous to traffic or pedestrians, in the sense that in the ordinary course of human affairs, dangers may reasonably have been anticipated from its continued use by the public. 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.” It was only if those initial elements of the case were established on behalf of the claimant, and the burden rests with them, that there would be the necessity, then, to go on to consider whether the defence afforded to a highway authority under section 51 of the Act was made out.

12. Now, in the particular circumstances of this case, the issue that really has caused the majority of the debate between the parties is the appropriate assessment of dangerousness. In other words, can, in the circumstances of this case, the claimant establish one of those necessary initial findings of the court required by Lord Justice Steyn – namely, that the highway was in such a condition that it was dangerous to traffic or pedestrians. In the *Mills* case, the court went on to try to indicate what it meant by that description, and within it there is contained the important passage often cited in cases of this sort. The court reminds us that it is important that this area of tort law should not impose unreasonably high standards on highway authorities, otherwise scarce resources can be diverted from situations where maintenance and repair of highways is more urgently needed. The point is made in these terms: this branch of tort law ought to represent a sensible balance or compromise between private and public interest.

13. Now, in the circumstances of this case, it is that balance between public and private interest that is perhaps central to the resolution of this particular issue. The area in question certainly has an area of difference in levels. The protrusion of the tree root, the fact that there is a breaking up of the surface of tarmacadam in the vicinity of the tree root certainly has the potential to cause someone to stumble, to catch their foot, and to fall over. In other words, is it understandable that someone in the claimant’s position might stumble, trip or lose their balance and fall in this area? Well, the answer to that question is yes. It is quite understandable that someone might lose their footing, trip, fall or stumble in this particular area. But that is not the relevant test.

14. The court has to consider that whether, in applying that sensible compromise between public and private interest, the court has to consider whether this is a danger or defect or difference in levels against which it is reasonable to expect a highway authority to take precautions – in other words, that – these are the matters that must be considered in setting the appropriate test for dangerousness. The factors have to be weighed in the balance in considering the resolution of that particular issue. On the one hand, on behalf of the claimant, Mr Shepherd properly, sensibly and persuasively says “Well, look at the measurement that was taken at the time of the solicitors’ initial photographs.” The precise location of that measurement is not instantly apparent, but is certainly in the vicinity of the relevant area. It is certainly in the vicinity of the area broken up by the tree root, and it shows, potentially, a drop-off from the area of the tarmacadam to the general surface of the broken up area of about something in excess of 50mm. It is also suggested on behalf of the claimant – again, properly – that the extent of the protrusion of the root in this case means that the area affected by it breaking up the overall surface of the pavement is rather more extensive than one might expect in terms of, perhaps, being limited to a metre or so, or maybe less than that, from the base of the tree. In other words, that which we see is slightly out of the ordinary of – in relation to the consequences of roots in the vicinity of a mature tree.

15. Set against those contentions on behalf of the claimant, it seems to me that the features that are relevant to consider on behalf of the defendants are these: if one has regards primarily to the photographs taken in 2016, it seems as if the area of the pavement in the vicinity of this tree was otherwise in a reasonably safe condition, in the sense that it is really rather unremarkable. The distance between the mature tree and the dwarf wall which forms the curtilage of the adjoining property is relatively significant. That particular area was where one would ordinarily expect pedestrians to walk, and looking, certainly, at the photographs in 2016, the area seems unremarkable. Secondly, on behalf

of the defendants, it seems to me that if one has regards to what has actually happened here, the area that is complained of is plainly caused by the large tree roots protruding from the base of the mature tree. There have, from the photographs, seemingly, been attempts to place tarmacadam as close to those tree roots as possible, to place it close to the tree roots in such a way as to allow the flexibility of tarmacadam, perhaps, to absorb some of the movement that would inevitable take place.

16. Thirdly, on behalf of the defendants, it's right to point out that the photographs taken in 2014 show a fairly similar situation as well, and it is not a case where there is evidence of significant complaints or further incident caused by this particular mature tree. On the face of the evidence, it has been in a similar sort of condition for a protracted period of time, albeit there may have been some repair carried out in the vicinity of this tree sometime in October 2015. Fourthly, it seems to me that the court has to take into account what can generally be regarded as the benefit of the existence of trees in the pavement lining carriageways within the city centre – or within a city – indeed, primarily residential areas. There is no doubt that it would be regarded generally by the public as a good thing to have trees lining roads, rather than for them to be removed and perhaps render the surface of any pavement rather more obviously smooth and not the subject of the type of potential change in levels illustrated in this case.

17. So, when one applied all these factors together, it seems to me that notwithstanding the fact that the claimant did was in this area, it is an area of the pavement, particular bearing in mind the findings made as to how close to the tree the accident took place, it is an area where it is properly to be regarded as not ordinarily where pedestrians would walk. If I take that into account, it seems that the court can properly conclude from all of those factors that the risk associated with this particular section of the pavement was of a low order. Highway authorities deal with many, many kilometres of pavement where there exist mature trees. They are, by definition, living things and as such they are unpredictable as to precisely how they will affect their immediate environs. They do not grow roots in ways which are directly predictable. They are not roots which grow within only a certain distance from the base of the tree. They are, it seems to me, likely to cause unevenness of the sort shown in the photographs relevant to this case.

18. Now, every case must turn on its own facts, and certainly cases involving unevenness of the base of trees will inevitably turn on their own facts. But it seems to me that such unevenness as is illustrated in the case of a mature tree is perhaps inevitable. Is the sort of unevenness seen in this photograph sufficient to cause me to conclude that the balance in terms of public and private interests is tipped in favour of the private individual? Having carried out that assessment and having carried out that balancing exercise and having regard to the photographs and the evidence that has been given before me, I am not persuaded that that balance tips in favour of the private individual. In the circumstances of this case, it seems to me that that which is illustrated does not represent a danger against which it was reasonable to expect the local authority to take precautions, and it is not, in the circumstances of this case, something which would found liability pursuant to section 41 of the Highways Act 1980.

19. In the circumstances, there is no need for me to go on to consider the relevant issues associated with section 58 of the Highways Act, albeit this was probably not a case where that would be of particular relevance in any event. Consequently, whilst one always has sympathy for a claimant who falls, one can always see how pavements cause potential

difficulties for individuals, this is not a case where that balance is tipped in favour of allowing me to make a finding in favour of the claimant.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge