IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION **Claim No: QB/2013/0106**

B E T W E E N :

MISS LISA SIMSON

CLAIMANT/RESPONDENT

-AND-

LONDON BOROUGH OF ISLINGTON

DEFENDANT/APPLICANT

ARTICLE ON CASE

Reported: [2013] EWHC 2527 (QB) 2013 WL 3550500

TITLE

A nearby defect ought to have triggered a thorough investigation of the area of the highway that would have identified the index defect (under a parked car).

INTRODUCTION

This matter was an appeal against the decision of Mr Recorder Bowley QC sitting in the Clerkenwell and Shoreditch County Court in relation to a claim for damages for breach of section 41 of the Highways Act 1980. In the first instance the judge found for the Claimant and awarded her damages of £9,476.62.

The appeal went before Mr Justice Lewis on the 17th July 2013. James Osborne Barrister, was instructed by Ann Lee of Minster Law appeared on behalf of the Claimant/Respondent. Lisa Dobie appeared on behalf of the Defendant/Appellant.

FACTUAL BACKGROUND

The background to the claim is that on the 19th April 2009 the claimant left her home in

Hargrave Road in the London Borough of Islington and walked to the local shops. Hargrave Road is s typical one way London Street with a combination of residents and pay and display bays on either side of the road.

On her return journey home she walked down the uneven numbered side of Hargrave Road from her home as she felt threatened by people who were coming in the opposite direction. She crossed the road opposite her front door. As she crossed the road passing between two parked cars, she tripped and fell, sustaining a personal injury to her right foot and ankle for which she required hospital treatment.

At trial, the judge was assisted with photographs of the area taken by the claimant three weeks after the accident, the defendant's photographs of the locus and the claimant's expert locus report, for which the claimant only had permission to rely on its photographs.

The defendant sought to expose inconsistencies in the claimant's case as the claimant's own photographs of the defect differed from the claimant's locus photographs. In oral evidence the claimant disagreed with the expert commentary and said that the accident was actually on the kerbside part of the carriageway as shown in her own photographs where the accident was shown to be on the kerbside of the carriageway.

The council's set of photographs showed the accident spot as being on the carriageway side of the parking bay, not the kerbside. There were also two statements of the two council witnesses who said the claimant had told them that that was where the accident occurred.

At trial, counsel for the defendant reminded the judge of the case of *James v Pwllheli*

Pembrokeshire District Council [1993] PIQR 144 where the Court of Appeal emphasised that the question in each case is whether the particular spot where the plaintiff tripped or fell was dangerous. If it was, then there may be liability. But if the particular spot was not dangerous, then it is irrelevant that there were other spots nearby that were dangerous.

At trial, Recorder Bowdery QC found that the claimant proved the mechanism of the accident and that the alleged defective spot was causative of her fall, the defect posed a real source of danger to ordinary users of the highway and went on to find that the defendant had not proven that it has a reasonable system of maintenance and inspection.

Further to the finding for the claimant, the defendant appealed on the following grounds, in summary:

1. That the judge was wrong to find the accident took place at the kerbside edge (and not the carriageway edge of the resident's bay) and it says there are three reasons for that.

    a. The judge had failed to take into account the claimant's own July 2011 photographs;
    b. The judge failed to take into account the defendant's 2011 photographs;
    c. The judge had misinterpreted one of the documents and as a result had preferred the evidence of the claimant to the defendant's evidence, when in fact properly interpreted the document did not support that conclusion.

2. The second ground of appeal is that the judge made various errors of law on assessing what was reasonably required and on the proper interpretation of section 58 of the Highways Act 1980.

Ground 1

In dealing with the first ground, the challenge to the finding that the accident took place at the kerbside edge of the carriageway, Justice Lewis referred back to the trial judge's judgment that set out the factual evidence that the judge considered that included all the photographs. Having recorded the evidence that he had heard, the trial judge said this at paragraph 12:

> *"However, going back to the Claimant, I found the Claimant to be an impressive witness. She answered the questions clearly and concisely. She did not exaggerate or evade questions during her oral testimony. Her answers were measured and credible. It may be correct that some of her pre-action details may have confused the defendant as to the location of the accident and the date of the accident and her evidence pre-action was unhelpful and no doubt caused the defendant concern as to the credibility of her case."*

At paragraph 18 of Justice Lewis's judgment, he decided the following:

> *"18 But, in my judgment, there is a much more fundamental reason why this ground of appeal does not succeed. The fact is that the judge had already found, at paragraphs 16 and 17, and having heard all the witnesses, that he believed the evidence of the claimant. He accepted that the location of the accident was on the kerbside edge of the parking bay and he came to that conclusion because he found the claimant to be an impressive, credible and convincing witness and what she said*

was supported by photographs taken just a few weeks after the event. As he said at paragraph 21, if there was any doubt about the location, then he would prefer the evidence of the claimant to the evidence of Mr Green and dealt with the form. But it is clear from the judgment read as a whole that the judge was in fact not in any doubt. He believed, having heard the witnesses, that the accident occurred where the claimant said it occurred. As Miss Dobie realistically accepted, if that was the reading I gave to the judgment, this particular sub-ground of appeal could not succeed. So for those reasons the first ground of appeal with its three parts does not succeed."

With respect to the second ground of appeal, questioning the judge's finding on reasonableness, the council's defence under Section 58(1) of the Highways Act 1980 says:

"In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic."

Justice Lewis drew attention to Section 58(2) (d) as one that was particularly relevant which says:

"…whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates

was likely to cause danger to users of the highway."

The judge acknowledged that is not enough if there was some defect in some other part of the carriageway which, if that other defect had been identified, would have led to repairs and if those repairs would in fact have covered both the defective location and the accident location.

In the from *obiter dicta* of the Court of Appeal in the case of *Barker v Lancashire County Council [2013]* EWCA Civ 582 Justice Lewis stated that:

"Although obiter dicta , I consider that they are correct and I will follow the dicta of the Court of Appeal. The case involved a claim in relation to cobblestones in a tree pit and some of the individual cobblestones were dangerous. What the court said at paragraph 4 is this:

"The judge further held that if he was entitled for the purpose of section 58 of the 1980 Act to look beyond the individual cobblestones to the tree pit as a whole, the council might not have discharged the burden of proof on them under that section because there were indications of untidiness and loose cobblestones which might have caused the council to re-lay the whole area of the tree pit. If that had been done, it would have been done before 29 October by the removal of the cobbles, including the one that caused the accident."

Justice Lewis was careful not to impose unduly high standards on the highway authority.

That has been said by the Court of Appeal in the case of *Mills v Barnsley Metropolitan Borough Council [1992]* PIQR at page 291 when Steyn LJ stated:

> *"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 cogently needed."*

Ground 2

Counsel for the defendant stated that the trial judge set the standard of section 58 of the Highways Act 1980 too highly and failed to take into account that it was a question of reasonableness as follows:

1. It was accepted by all that cars were virtually always parked on this street and in this spot. It was not challenged that the defect would not be visible when a car was parked in that parking bay.
2. The trial judge found that the defendant ought to have been aware of the defect in the accident location because the inspector should have seen a defect at the carriageway edge of the parking bay and that in turn ought to have triggered a more thorough investigation, which ought to have led to the detection of the accident location defect.
3. The reference to the aforementioned investigation was unspecified and was not supported on the evidence and set the requirements under section 58 too highly.

Interestingly, the judge stated the following when giving his judgment:

> *"Firstly, in my judgment, it is correct that the focus should be on whether or not the authority could reasonably have discovered the defect at the accident location, in this case the defect on the kerbside edge of the parking bay. Secondly, in my judgment, it*

may well be the case, depending on all the facts, that the presence of some danger or defect at one part of the carriageway may be sufficient to trigger alarm bells that something may be wrong on other parts and there needs to be an investigation of those other parts of the carriageway to see if there is a defect on those parts.

...

32 Just pausing here, the example that was given in discussion was a section of the carriageway which had a wheelie bin on it. There may be a crack to the left-hand side of the wheelie bin. There may be a crack to the right-hand side of the wheelie bin. The area underneath the wheelie bin may not be visible. However, the presence of cracks on either side of the wheelie bin may well mean that it is reasonable to investigate whether or not the crack also existed under the wheelie bin....".

...

"33 In my judgment, read fairly and as a whole, the judge in this case was saying no more than this: this area of road had significant and serious dangers that were visible. Even if cars were parked on the accident location, the presence of those other significant and visible defects should have triggered investigations. If they had been investigated, they would have led to the defect in the accident location being discovered and repaired. That finding, in my judgment, does not involve any error of law in relation to section 58. It focuses on the accident location, but it recognises that other factors may trigger a need to carry out investigations into the accident location. There was no failure, in my judgment, to realise that the relevant standard was reasonableness and the court has to bear in mind the need not to impose unreasonable burdens on the authority. The judge clearly bore that in mind and indeed referred to the relevant case law. The judgment as to what is reasonable on the facts is one for him unless, given that this is an appeal, I consider that his conclusion was wrong or

involved a procedural or other irregularity. I do not consider that his decision was wrong or that there was any irregularity here.

...

36 Secondly, the judge did not impose too high a standard in this case. Where you have damage in a parking bay of the sort that you see in the photographs in 2009, it is not imposing too high a standard to say that the authority should have inspected the kerbside part of the carriageway as well as the carriageway side of the parking bay. If that means a car has to be moved, that is not of itself, in my judgment, unreasonable. You cannot say, as the appellant says, that simply requiring a car to be moved for investigations to be carried out imposes an unduly high standard. Further, in my judgment, there was evidence before the judge as to the state of the carriageway in 2009. He had the photographs which were taken a few months later and he was entitled to conclude on the basis of those photographs that there was significant rutting over the area of the carriageway that formed the parking bay. Finally, it was sufficient on the facts of this case for the judge to say that further investigations would have revealed the defect. In my judgment, he did not have to set out each and every step and each and every type of investigation that could be carried out before he reached the conclusions that he did.

...

37 However, standing back from ground 2, the position is this: there was a defect in 2009 on the kerbside edge of the parking bay which caused the injury to the claimant. It was clear from the 2009 photographs that other parts of the carriageway in the parking bay also had what were described as significant and serious defects. The judge was entitled to take the view that that should have triggered an awareness of the need for investigations and, if there had been investigations, the defect would have been

discovered and repaired at the accident location. Therefore, in my judgment, ground 2 of the appeal also fails. In those circumstances, as both grounds of appeal fail, the appeal itself is dismissed."

The example given by the judge in the appeal was a section of the carriageway which had a wheelie bin on it. There may be a crack to the left-hand side of the wheelie bin. There may be a crack to the right-hand side of the wheelie bin. The area underneath the wheelie bin may not be visible. However, the presence of cracks on either side of the wheelie bin may well mean that it is reasonable to investigate whether or not the crack also existed under the wheelie bin.

This case of *Simson v London Borough of Islington* differs from Court of Appeal in the case of *Barker v Lancashire County Council* [2013] EWCA Civ 582 and *James v Pwllheli Pembrokeshire District Council* [1993] PIQR 144 where the Court of Appeal emphasised that the question in each case is whether the particular spot where the plaintiff tripped or fell was dangerous, because in this index case, it was established that a different defect should have led to the discovery of the index defect that was not immediately apparent. The general condition of the area of the carriageway should have led to a thorough investigation, where the index defect would have been found under the parked vehicle in the parking bay.

James Osborne

16th October 2013