EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 76
PD1373/14

Lady Paton
Lord Drummond Young
Lady Clark of Calton

OPINION OF THE COURT

delivered by LADY PATON

in the cause

IAIN POCOCK

Pursuer and reclaimer

against

THE HIGHLAND COUNCIL

Defenders and respondents

Pursuer and reclaimer: J Brodie QC, McNaughtan; Digby Brown LLP
Defenders and respondents: R Milligan QC, Murray; Ledingham Chalmers LLP

12 December 2017

A tripping accident

[1] The pursuer is a crofter. On 9 February 2012, when aged 43, he was walking in Baron Taylor Street, Inverness. He tripped on uneven paving slabs forming part of a central drainage channel. He fell and injured his left knee.

[2] The pursuer sued the defenders as the roads authority responsible for the street. He sought damages on the basis of a breach of their common law duty of care owed to pedestrians. The unevenness had been identified on 20 December 2011, and the defenders had failed to follow their own policy by remedying it within seven days of that date, failing

which within 21 days.

[3] In a proof before Lord Clark, conflicting evidence was led concerning the measurement of the unevenness. The pursuer's case was that the height difference was 28 mm. That estimate was given by the pursuer's expert witness Mr McMahon, an engineering consultant. He based his evidence on photographs taken by the pursuer and his wife about two weeks after the accident. The pursuer had propped up a Swan Vestas matchbox at the irregularity to provide a guide to scale. The defenders' position was that the height difference was less than 20 mm. That measurement was based on the evidence of the local authority's roads inspector Miss Yvonne Low. Miss Low gave evidence that she carried out monthly inspections of Baron Taylor Street. Prior to 20 December 2011 there had been nothing of note at the relevant area: but on that date, in accordance with the defenders' policy (see paragraph [5] below), she had issued a works instruction requiring a repair within 21 days. Accordingly, as she explained, the defect must have been less than 20 mm (paragraph [70] of the Lord Ordinary's Opinion). On 23 January 2012 she issued a further works instruction for the defect, requiring repair within 21 days. Again she explained that the defect must have been less than 20 mm.

[4] About two weeks later, on 9 February 2012, the pursuer had his accident. The irregular paving slabs were repaired some time later. In her evidence, Miss Low explained that:

> "There was a general problem in Baron Taylor Street in that the drainage channel was failing … what was discovered [was that] the paving slabs which made up the drainage channel area had been embedded in sand and not in concrete and the sand had partly washed out …" (paragraph [72] of the Opinion)

In cross-examination, she accepted "the possibility of the defect getting worse in time through deterioration" (paragraph [75] of the Opinion).

The defenders' maintenance and repair policy

[5] The defenders had certain written policies which were applicable at the time of the accident, including the "Road Network Hierarchy and Inspections Policy" and "Well-maintained Highways – Code of Practice for Highway Maintenance (2005)" (referred to as "the Code"): paragraphs [2] and [44] to [46] of the Lord Ordinary's Opinion. Defects found during safety inspections were to be classified as *inter alia* Category 2M (medium level of hazard or risk with a response time of 21 days) or Category 2H (high level of hazard or risk with a response time of seven days). The response times were "intended for temporary repairs to make the defect safe": paragraph [45] of the Opinion. Miss Low explained in evidence (paragraph [69]) that:

> " … A trip hazard with a hard edge level difference in height of 20 mm or more was a safety defect. This height difference was not stated in terms in the [defenders'] policy, but was the basis upon which she proceeded … If she found a height difference of greater than 20 mm she would stipulate a seven day repair period. For a height difference of less than 20 mm, it would be a 21 day repair period. The latter type of defect was something which it was considered would be better attended to in 21 days rather than left to the next monthly inspection."

[6] The pursuer's expert witness Mr McMahon accepted –

> "… that the Code is the benchmark for roads authorities, but they might justifiably depart from the Code for a variety of reasons, including population density, amount of use of the road or footpath, climate, topography and budgetary considerations… (paragraph [94] of the Opinion, reflecting Mr McMahon's evidence as noted in paragraph [51])"

Mr McMahon also accepted –

> "… that the guidance in the Code was not prescriptive and that not all Scottish roads authorities use the same threshold level for defects or deal with the same type of defect in the same way. When asked who exercises the judgment as to what to repair, he said he imagined it would be the area manager (paragraph [53] of the Opinion)."

The Lord Ordinary's decision

[7] The Lord Ordinary found *inter alia* that the pursuer had failed to prove a height differential of 28 mm (paragraphs [113] and [119] of his Opinion). He proceeded on the basis

that the height difference was less than 20 mm. He concluded that there had been no breach of the duty of reasonable care owed by the defenders to the pursuer, and also no contributory negligence on the part of the pursuer.

Submissions for the pursuer

Grounds 1 and 2

[8] Counsel for the pursuer submitted that the Lord Ordinary had not resolved the conflict in evidence about the height differential. He had failed to make a finding in fact, or to provide reasons for accepting one body of evidence (Miss Low) rather than another (Mr McMahon). He did not have a proper basis for concluding that the trip hazard was less than 20 mm at both inspections. He erred by failing to find that the irregularity was 28 mm. A substitute finding should be made that, on a balance of probabilities, the height difference was in the order of 28 mm at the time of the inspections.

Ground 3

[9] *Esto* Grounds 1 and 2 were not well-founded, and *esto* the irregularity was taken to be less than 20 mm, that irregularity nevertheless constituted a "trip hazard". That conclusion was based upon the whole circumstances of the case, not merely upon Miss Low's categorisation. The weight of the evidence, including the location at the city centre, the identification of the irregularity on two occasions, the roads inspector's view that there was a trip hazard, the defenders' roads policy with timescales for repair, the 21-day work order, and the fact that it was known that defects at that area could deteriorate rapidly, gave rise to an inference that the standard of care required of the defenders was to effect a repair in the time available before the pursuer's accident. The judge had to be an independent objective

assessor of what was required to fulfil the minimum standard of reasonable care at common law. The Lord Ordinary erred by giving too much weight to the significance of the roads authorities' practices and codes.

[10] Ultimately, senior counsel submitted that the reclaiming motion should be allowed; the Lord Ordinary's interlocutor of 10 March 2017 recalled; and decree granted in favour of the pursuer for the sums referred to in paragraph [129] of the Lord Ordinary's Opinion.

Submissions for the defenders

Grounds 1 and 2

[11] The Lord Ordinary had resolved the conflict in the evidence. He made a clear finding based on the credibility and reliability of the roads inspector Miss Low. He accepted her evidence that the height difference at the time of the inspections was less than 20 mm. An appeal court should be slow to interfere with such a finding (*Clarke* v *Edinburgh and District Tramways Co Ltd* 1919 SC (HL) 35 at page 36; *McGraddie* v *McGraddie* 2014 SC (UKSC) 12; *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 paragraphs [62] to [67]; *CD* v *Lanarkshire Acute Hospitals NHS Trust* [2017] CSIH 30 paragraphs [23] and [24]; *AW* v *Greater Glasgow Health Board* [2017] CSIH 58 paragraphs [38] to [58]). The Lord Ordinary's assessment of the height difference was not open to challenge.

Ground 3

[12] There was a danger of confusing a witness's assessment of an irregularity as a "hazard" and the court's assessment. The Lord Ordinary had not made that error. He accepted that Miss Low described it as a hazard, but he himself did not make a finding that it was a hazard (paragraph [114] of his Opinion). Thus there were two questions: (i) was the

irregularity a trip hazard within the defenders' policy (yes); (ii) was the irregularity a hazard in terms of *Macdonald* v *Aberdeenshire Council* 2014 SC 114 (no). A failure by a roads authority to follow their own policy was not necessarily negligence at common law (*Esdale* v *Dover District Council* [2010] EWCA Civ 409 paragraphs [11] to [13]). Even if the Lord Ordinary's Opinion could be read as not excluding the existence of some sort of tripping hazard, his conclusion indicated that the defect, deficiency or irregularity in the surface was at the lower end of the scale of hazards, and thus a common law standard of reasonable care did not require its repair within the time available prior to the accident.

[13] The Lord Ordinary had heard all the evidence. He had applied the correct tests. He had, in the exercise of his judgment, reached a conclusion. An appeal court should be slow to interfere (*Esdale cit sup*, *McClafferty* v *British Telecommunications Ltd* 1987 SLT 327 at page 328D, *McLaughlin* v *Strathclyde Regional Council* 1992 SLT 959 at page 961J; *Mills* v *Barnsley Metropolitan Borough Council* [1992] PIQR 291 at P293 and P294; *Morton* v *West Lothian Council* 2006 Rep LR 7 paragraph [67]). The reclaiming motion should be refused.

Discussion

The extent of the unevenness

[14] The Lord Ordinary proceeded on the basis that the unevenness in the paving slabs, measured at the dates of the two inspections (20 December 2011 and 23 January 2012) was proved to be less than 20 mm. The evidence which had been led included the following.

[15] First, evidence given by the roads inspector Miss Yvonne Low. The Lord Ordinary clearly accepted her evidence. He described her at paragraph [112] as "a careful individual, who took her job very seriously". He stated that he was "left in no real doubt that if she had come across a hazard with a height difference of greater than 20 mm she would have

classified it as falling within Category 2H and hence requiring repair within seven days". In relation to this witness to primary fact, the Lord Ordinary was entitled to reach the views he did.

[16] Secondly, the Lord Ordinary had the contemporaneous records including the works instructions which Miss Low issued. These were consistent with her oral evidence.

[17] Thirdly, the Lord Ordinary took into account the fact that Miss Low was the only eye-witness physically present at the dates of the inspections. She alone could provide information about the height differential based upon actual presence at the site on those dates. By contrast, the pursuer's engineer Mr McMahon did not have that benefit (paragraph [110] of the Opinion). He based his measurements and opinion on photographs taken by the pursuer and his wife some two weeks after the accident, with a match box positioned on the paving slabs to give some indication of scale. Mr McMahon accepted that the height difference could have changed between the dates of the inspections and the date of the accident (paragraph [113] of the Opinion.) He also accepted that the height difference might not have been as great as 28 mm on 20 December 2011 (paragraph [110] of the Opinion).

[18] The Lord Ordinary took all the evidence outlined above into account. From his Opinion, it is clear that he found Miss Low to be a credible and reliable witness. He gave her evidence considerable weight (paragraphs [111] and [112] of the Opinion). From his Opinion, it is clear that he gave less weight to the evidence of Mr McMahon, bearing in mind the method by which Mr McMahon had reached his estimated figure of 28 mm, and the qualifications noted in paragraph [17] above. He was entitled to do so. He thus resolved the conflict in evidence, by preferring the evidence of Miss Low to that of Mr McMahon. He ultimately stated at paragraph [119];

> "I therefore conclude that the pursuer has failed to establish the key factual basis of his pleaded case: that the defect, at the date of its identification, involved a height

difference of greater than 20 mm."

Thereafter he proceeded on the basis that he was satisfied that there had been a height difference of less than 20 mm on the inspection dates. On the evidence before him, he was entitled to do so. We are not persuaded that there is any merit in the pursuer's first or second grounds of appeal.

Reasonable care at common law

[19] In *McClafferty* v *British Telecommunications plc* 1987 SLT 327, a pedestrian's foot caught on a manhole cover projecting ¾ inch (approximately 19 mm) above the level of the pavement, resulting in a fall and injury. Lord Justice Clerk Ross considered the question of the roads authority's delictual liability at page 328D as follows:

> " … [In *Gordon* v *Glasgow Corporation* and *Innes v James K Neil & Co and Glasgow Corporation,* both decisions unreported] it was pointed out that it was always a question of degree whether negligence could be established where there was some degree of inequality of surface on a public footpath. In the former case, Lord President Clyde said:
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> > 'There is no doubt that inequality of surface, even a very small one, may result in a similar mishap to a pedestrian. But the maintenance of complete uniformity on a city foot pavement is a counsel of perfection considerably above the standard attainable in practical administration. The question of whether there has been neglect of duty is always a question of degree.'
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> … In *Meggs* v *Liverpool Corporation* [1968] 1 WLR 689 at page 672 Lord Denning MR said:
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> > 'It seems to me, using ordinary knowledge of pavements, that everyone must take account of the fact that there may be unevenness here and there. There may be a ridge of half an inch or three-quarters of an inch occasionally, but that is not the sort of thing which makes it dangerous or not reasonably safe.'
>
> That case was one where the plaintiff tripped and hurt herself because certain flagstones were uneven so that one of them had sunk about ¾ inch …"

[20] Similar reasoning was adopted by Lord Coulsfield in *McLaughlin* v *Strathclyde Regional Council* 1992 SLT 959, at page 328D, when dealing with a defect in a road surface. He observed:

> " … Any unevenness in a road or pavement may cause a fall, but I think that it is clear that a road authority is not required to keep all pavements, far less all parts of the road surface, absolutely flat and even..."

See too the observations of Steyn LJ in *Mills* v *Barnsley Metropolitan Borough Council* [1992] PIQR 291 at P294 to P295.

[21] A more recent authority relating to the state of a road is *Macdonald* v *Aberdeenshire Council* 2014 SC 114, where Lord Drummond Young explained:

> " [64] … for a roads authority to be liable to a person who suffers injury because of the state of a road under their charge, two features must exist. First, the injury must be caused by a hazard, the sort of danger that would create a significant risk of an accident to a careful road user. Secondly, the authority must be at fault in failing to deal with the hazard. This means that the pursuer must establish that a roads authority of ordinary competence using reasonable care would have identified the hazard and would have taken steps to correct it …
>
> [65] In my opinion this state of the law strikes a fair and reasonable balance between the interests of [road-users] on the one hand and the interests of the roads authority on the other hand. Roads authorities are under a public law duty to maintain the roads under their care, and it seems fair that they should be held to minimum standards not just in public law but as a matter of delictual liability in civil law …"

[22] Senior counsel for the defenders submitted that the irregularity in the paving slabs, being less than 20 mm, did not constitute a "hazard" *within the definition in Macdonald*. Miss Low's categorisation was not definitive. It was for the court to determine whether or not the unevenness was a hazard falling within the definition in *Macdonald.* The Lord Ordinary had not found it to be one.

[23] We agree. The Lord Ordinary did not rule out the existence of a trip hazard of some sort (cf Lord Justice Clerk Ross in *McClafferty,* quoting Lord President Clyde, paragraph [19] above). Indeed in paragraph [114] of his Opinion, the Lord Ordinary stated:

> " … the defect was nonetheless, as Yvonne Low accepted, a trip hazard which fell within Category 2M and the Council's policy was to repair it within 21 days."

However the Lord Ordinary correctly took into account the fact that –

> " … a failure by the Council to follow its own policy or plan is not of itself sufficient to establish a failure to exercise reasonable care (see *Syme* v *Scottish Borders Council*, at

> paras 18 and 20). The policy cannot dictate the content of the duty of reasonable care. The purpose of the hierarchy within the policy, according to paragraph 1.3 of the document, is to 'provide the basis for a maintenance strategy and enable the prioritisation of works activities …'. It is ' … a tool to determine where resources should be prioritised (paragraph [114] of the Opinion).'"

[24] Similar observations were made by Smith LJ in *Esdale* v *Dover District Council* [2010] EWCA Civ 409 at paragraphs [12] to [13]:

> "[12] I cannot accept [counsel's submission that if the council fails to follow its own policy, the council has failed to take reasonable care and is in breach of the common law duty of care]. The test of whether, in all the circumstances, the council has taken such steps as are reasonable to see that visitors are reasonably safe does not depend upon what standards of safety the council sets itself as a matter of policy. The test to be applied is an objective one. The question, in effect, is: does the judge, as the embodiment of the reasonable person, think that the council has taken such steps as are reasonable, in all the circumstances, to keep the visitor – the claimant here – reasonably safe? What the council sets as a policy is certainly not determinative, although I would not go so far as to say that it is irrelevant. One can immediately see that the council's policy could not be determinative. If the council had a policy that footpaths need not be repaired unless there was a defect of more than two inches, no one would suggest that, if that policy were followed, it could be said that the council had taken such care as was reasonable. Conversely, if the council wished to set a very rigorous policy in an attempt to provide a high standard for its visitors, it would not follow that the standard of what is reasonable must be set at the same level.
>
> The judge was not only entitled but obliged to form his own independent view of the dangerousness or lack of it on this defect in the footpath, and also whether the council's decision, through Mr West, not to order its repair was consistent with taking reasonable care for the safety of visitors. In my view, the judge's legal approach was correct. The actual conclusion which he reached was one which, in my view, he was entitled to reach. This was a matter of judgment for him and provided that he took all relevant matters into account and did not take irrelevant matters into account, this court will not interfere with that judgment any more than it will interfere with an exercise of discretion. This is not an exercise of discretion but an exercise of judgment, but the judge's view will command the respect of this court unless he has clearly erred …"

[25] It was therefore for the Lord Ordinary, taking account of all the circumstances (including, but not on a determinative basis, the defenders' published roads maintenance policy and repair timetables), to exercise his judgment in assessing whether there had been a breach of the defenders' duty of reasonable care.

[26] In carrying out that task, the Lord Ordinary took into account *inter alia* the nature,

size, and location of the irregularity; the need for roads authorities to have a system of prioritisation, related to the degree and nature of any risk; the categorisation of the height differential by Miss Low as a medium risk with an expected response time of 21 days in terms of the defenders' published policy; Miss Low's evidence that the majority of roads authorities would not intervene where the height differential was less than 20 mm; and Mr McMahon's evidence that "for the vast majority of roads authorities, the intervention level was 20 mm" (paragraph [116] of the Opinion). The Lord Ordinary also took into account certain extracts from the Code relating to Westminster Council (15 mm as the "investigatory level" with no clear designated consequence or response time) and Perth and Kinross Council (a 20 mm height difference defined as "a moderate level of hazard" with a designated response time of seven days, but no guidance in respect of a differential of under 20 mm: paragraphs [46] and [117] of the Opinion). Further, the Lord Ordinary took into account relevant authorities including *McClafferty* v *British Telecommunications plc, McLaughlin* v *Strathclyde Regional Council,* and *Macdonald* v *Aberdeenshire Council* (see paragraphs [19] to [21] above), and noted that a failure by a roads authority to follow their own policy was not of itself sufficient to establish a failure to exercise reasonable care. Ultimately the Lord Ordinary pointed out that:

> "[118] The pursuer led no evidence that a roads authority of ordinary competence exercising reasonable care required to repair, within 21 days, a hazard created by a height difference of less than 20 mm. As noted, Mr McMahon proceeded upon the basis that the defenders required to repair defects of greater than 20 mm within specific periods. He did not deal at any stage with the repair of defects of less than 20 mm."

[27] Against that background, taking all the circumstances of the case into account, and applying authorities including *Macdonald* v *Aberdeenshire Council* 2014 SC 114, the

Lord Ordinary concluded that there had not been a breach of the defenders' common law duty of reasonable care.

[28] In our opinion, the Lord Ordinary was entitled to do so. He weighed up all the relevant evidence, found certain facts established, applied the law correctly, and in the exercise of his judgment concluded that the defenders had not failed in their duty of reasonable care owed to the pursuer at common law. We do not accept that the Lord Ordinary gave undue weight to the evidence of roads authorities' practices and codes. We have been unable to identify any error in his approach or his conclusion. Absent any error, an appeal court should be slow to interfere with such an exercise of judgment (*Elsdale cit sup, McClafferty* v *British Telecommunications Ltd* 1987 SLT 327 at page 328D, *McLaughlin* v *Strathclyde Regional Council* 1992 SLT 959 at page 961J; *Mills* v *Barnsley Metropolitan Borough Council* [1992] PIQR 291 at P293 and P294; *Morton* v *West Lothian Council* 2006 Rep LR 7 paragraph [67]).

[29] In the result, we are not persuaded that this is a case in which we should interfere. We accordingly reject the third ground of appeal.

Decision

[30] For the reasons given above, we refuse the reclaiming motion. We continue meantime any question of expenses.