[2016] JMSC Civ. 146

CLAIM NO. 2005HCV01946

BETWEEN	**HYACINTH GRAHAM**	**CLAIMANT**
AND	**NATIONAL WORKS AGENCY**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

Miss A Chapman instructed by Gayle Nelson & Co for the Claimant

Mrs Gail Mitchell instructed by the Director of State Proceedings for the Defendants

Heard: November 9, 10 and 25, 2015, February 18, 2016 and August 31, 2016.

Injury sustained on roadway – Non-feasance – Mis-feasance – Negligence

LINDO J:

[1] On April 13, 2005 the claimant filed a claim for damages in negligence against the National Works Agency (NWA) and the National Water Commission, alleging that the defendants are responsible for providing and maintaining drains and sewers along public roadways and that on or about April 2000 while exiting her gate at 28 Penn Street in Kingston, she fell backwards into an improperly sealed manhole and as a result suffered severe injuries, loss and damage.

[2] The claim was subsequently amended and by the Further Amended Claim Form and further Amended particulars of Claim filed on December 20, 2007 the claimant indicated that the defendants are the NWA and the Attorney General of Jamaica. This came about as a result of the determination by the court made on that same date that they were the proper defendants. Their amended defence filed on November 6, 2007 was allowed to stand.

[3] In the Further amended claim and further amended Particulars of Claim, the claimant indicates, *inter alia,* that she '... *suffered appalling injuries...in addition to her pain, permanent disabilities and disfigurement, has suffered serious prejudice to her earning capacity.'*

[4] The defendants have denied negligence and averred that the injury and loss claimed to have been suffered by the claimant was solely or contributorily due to her own negligence and there was no breach of duty on their part. The defendants also indicated that they were relying on the common law defence of nonfeasance.

[5] At the trial, in her witness statement which stood as her evidence in chief, Ms Graham relates that there is a long manhole directly in front of the entrance to her gate which is loosely covered with square or rectangular pieces of iron which have never been properly secured and they move when persons step on them or cars drive near or on them and there are times when the opening is not covered.

[6] She indicates that she has never seen the authorities take any steps to secure the loose manhole covers and that due to the location of the manhole she has no alternative means of entering or exiting her premises. She further states that on the day in question she walked onto one of the covers, attempted to enter her premises and the manhole cover gave way and forced her to lose her footing. She also states that her lower body fell into the hole, she hit her face against the wall of her gate and she felt pain in her legs and in other parts of her body that had hit against pieces of iron that were located inside the manhole.

[7] She states that she was assisted by her daughter and that she took medication for the pain and when she woke up next morning her left leg was swollen and hurting more and she took more pain medication "to last me until Monday morning when we could go to the nearest clinic"

[8] She also states that on the Monday morning she went to the Comprehensive Health Centre and was examined and treated by a doctor and when her left thigh "continued to swell and hurt" she went back to the clinic the next day and was referred to the Kingston Public Hospital (KPH). She further indicates that she was sent to do a number of tests and was admitted to KPH "during April or early May 2000" where she spent approximately 21 days and subsequently her left leg was amputated.

[9] When cross examined, she indicated that the manhole has been there from the time she went there to live and that it was covered by a piece of zinc, as someone in her

yard placed it there “to let us get to cross”. She stated that she was always aware that part of it was not covered, that the zinc was there for a few months and admitted that it was dangerous, but stated she could not do anything about it. She also admitted that she stepped onto the zinc and that is when she fell.

[10] She explained that her lower body fell into the hole, and when pressed, she said her “left leg drop right into the manhole”. She stated that she did not go to the hospital at the time she fell but went to the Comprehensive Clinic on the Monday and later said she went to the clinic on Tuesday and went to the Kingston Public Hospital on the Wednesday.

[11] She also stated in cross examination that she has been unable to work for 15 years since the incident but when questioned further she admitted that she had not completely lost her ability to earn a living as she had a stall and was “selling where she was living”. She admitted to being able to wash, cook and to enjoy time with her family but indicated that her daughter accompanies her to “get around”.

[12] In response to her Counsel, she explained that when she said the manhole cover gave way, she was referring to the zinc “that was all over it”.

[13] An agreed bundle of documents was tendered and admitted in evidence as Exhibits 1 – 26, while letter dated November 9, 2009 from the NWA to Gayle Nelson & Co. attorneys at law, was admitted as exhibit 27.

[14] Sharon Hewitt was called as a witness on behalf of the claimant and her witness statement filed on November 25, 2010 stood as her evidence in chief. She indicates that she is a daughter of the claimant and has lived with her mother at 28 Penn Street all her life.

[15] She corroborated her mother’s evidence in relation to the position and condition of the manhole, that she has never seen the authorities take any steps to secure the covers and that she assisted her mother after she fell and took her to the Comprehensive Health Centre. She also gave evidence that her mother was referred to

the KPH and she took her there “during that same week” and that her mother stayed there for approximately 21 days.

[16] Ms Hewitt states that in August 2010 representatives from NWA came and covered up the manhole and that this was the first time in over ten years that she “ever heard of any of the proper authorities coming by to fix or attempt to fix the manhole”.

[17] In cross examination, she indicated that the manhole was not always covered as cars drive on it and shift the thick pieces of iron and that the manhole cover pose a danger of which she was aware. She stated that after the fall, her mother was “knocked out” for about 15 -20 minutes and she did not take her to the hospital. She also indicated that she did not notice the swelling on her mother’s foot until the Monday morning.

[18] Ms Hewitt could not recall if it was in May 2000 or September 2000 that she took her mother to the KPH, but indicated that she had to agree with Counsel’s suggestion that she took her on September 11, 2000. She also could not recall when her mother did surgery, but later agreed that it was May 2001.

[19] Mr Rae Parchment, Senior Highway Engineer employed to the 1st defendant since its inception on April 1, 2001, gave evidence on behalf of the defendants. In his witness statement dated March 31, 2011 he notes that the NWA “was created to manage, maintain and oversee the main roads network island wide as documented in the register of main roads...” He notes however, that “... register does not include all roads within the schedule of urban and suburban listing. So that ...Penn Street although falling within the suburban district, is not contained in the Main Roads Register, and thus would not have been maintained nor monitored by the Ministry of Construction...”

[20] The core functions of the NWA he states are “to plan, build and maintain a reliable, safe and efficient main road network and flood control system which protect life and property; support the movement of people, goods and services; reduce the cost of transportation; promote economic growth and quality of life and protect the environment”

[21] When cross examined, he explained that the manhole/drain, subject of the claim is a small drain which runs beside the road with some sections covered with metal grating and some which are not. He stated that the drain and metal grating were implemented by NWA and its predecessor. He disagreed that the purpose of the manhole cover is to prevent persons from falling in and said it was not to his knowledge whether NWA had taken steps to monitor or repair it.

[22] In response to Counsel for the Defendant, Mr Parchment sought to differentiate between a drain and a manhole. He said a manhole is an access to underground features such as utility duct or valve box and the cover is a door to gain access to whatever is below. A drain, he said, is a channel through which water flows and it can be open or have grille on top, as in the case of the drain in question. He also explained that drains can have holes but that manhole covers are solid. He indicated that the drain in question is very shallow.

[23] Dr Don Gilbert, Consultant Orthopaedic surgeon was called as an expert witness. His evidence is contained in his report dated April 11, 201. He indicates that his medical opinion is based on "a copy of the patient's notes from the Kingston Public Hospital" and he expressed the opinion that "although trauma may draw attention to the tumour it is not a causative agent for sarcomas"

[24] In cross examination, he agreed that trauma can aggravate or accelerate pre-existing disease and indicated that he was aware of the medical view that tumours can result from tissue disorganization, scarring or chronic inflammation that follows trauma.

[25] The expert report of Dr Dingle-Spence, Clinical Oncologist, was admitted in evidence.In the report dated July 30, 2013, she indicates, *inter alia*, that the claimant "sustained trauma to the L thigh in or about April 2000, she presented to the Kingston Public Hospital Casualty Department on September 11th 2000 (about 5 months after the initial injury) with a history of swelling in the L thigh over the preceding 3 months." She notes that the attending physicians have recorded the diagnosis as myxoid spindle cell sarcoma and opined, *inter alia*, that "it is unlikely that a tumor could grow from "scratch" to 14x8cm in such a short time".

[26] Dr Gillian Wharfe, Consultant in Haematology and Oncology, was also called as an expert witness. In her medical report dated April 5, 2012 she indicates, *inter alia,* that "...a fall is not causative in the development of a sarcoma but may just bring the swelling to the patient's awareness..."

[27] When cross examined, Dr Wharfe indicated that she was unable to give a "yes" or "no" answer to the question of whether trauma can aggravate or accelerate a pre-existing condition and when asked if she was aware of the medical view that trauma can be a factor causing cancer, she stated that she was aware.

Claimant's Submissions

[28] Ms Chapman noted that the preliminary issue of who is responsible for the Penn Street drain/manhole in question has already been determined and submitted that at all material times the 1st defendant had a duty of care to the claimant in ensuring that the relevant manhole/drain was properly, securely and safely covered for users of the road, such as the claimant.

[29] She stated that at all material times the 1st defendant was responsible for ensuring that the manhole/drain and covers were constructed, secured and/or maintained in a manner which does not pose a risk to persons using the roadway or who would come into contact with such manholes. Referring to the case of **Donoghue v Stephenson** [1932] AC 562, she further submitted that at all material times the 1st defendant would have been aware that users of the roadway would be the persons most immediately affected by any failure to adequately maintain and/or secure the relevant roadways, drainage systems and corresponding manholes/drain.

[30] She noted that the fact of the defendant's witness referring to it as a 'drain' makes it more evident that the 1st defendant had the responsibilities for and the duty of care in respect of the said drainage system, including that it is properly covered at all material times.

[31] Counsel pointed out that the 1st defendant would be aware that Penn Street is a public road and would be prone to public use, and the 1st defendant would have

contemplated that pedestrians such as the claimant would come into contact with the relevant manhole/drain which is one of the reasons covers are necessarily properly affixed to them. She added that it would have been reasonably foreseeable by the 1st defendant that if a manhole or drain for which it is responsible, on a public road, is not properly covered then there is a real likelihood that persons may fall into it and suffer injury and concluded that the defendants owed a duty of care at all material times.

[32] Counsel submitted that the defendants cannot rely on the defence of nonfeasance as the acts in question are acts of misfeasance. She indicated that as noted in case of **Sunbeam Transport Service Limited v The Attorney General, Lorna Smith et al v Sunbeam Transport Ltd.** (1989) 26 JLR 1, the common law exemption governing liability of a highway authority "extends only to cases of pure nonfeasance and the public authority is responsible for any active misfeasance by which the highway is rendered dangerous"

[33] Counsel also submitted that the case at bar is a case where works concerning the drainage area were "negligently effected" by improperly sealing and/or securing the relevant metal covers covering the long drain which the relevant public authority had created along Penn Street and not taking proper care to warn the public of danger.

[34] She expressed the view that the present case falls in line with acts of misfeasance noted in the cases of **Mayer and Corporation of Shoreditch v Bull** (1904) 90 LTR 210 and **McLelland v Manchester Corp**. [1912] 1 KB 118, as this is not a case in which "simply nothing was done" but where works concerning the drainage area was negligently effected by improperly sealing and/or securing the relevant metal covers covering the long drain that the relevant public authority created along Penn Street and not taking proper care to warn the public of danger.

[35] Counsel also expressed the view that by failing to properly cover the manhole/drain and /or by failing to properly seal and/or secure the manhole/drain and the manhole covers, the 1st defendant improperly and or carelessly effected the construction and placement of the manhole/drain and manhole drain cover, respectively

and by virtue of same, the 1st defendant committed an act of misfeasance which ultimately caused harm to the claimant.

[36] Counsel added that the 1st defendant interfered with the ordinary condition of the road by digging and constructing a long drain/manhole along the side of the road and placing a series of loose manhole covers on top of the said drain and the original structure of the road was altered by the installation of the drains and manhole covers and "the manner in which the alteration was installed, in particular the improper sealing of the manhole covers....."

Defendant's submissions

[37] Mrs Mitchell on behalf of the defendant submitted that claimant's case is grounded in negligence and that the defendant does not owe a duty of care to the claimant and was not negligent.

[38] Counsel cited the case of **Lochgelly Iron and Coal v McMillian** [1934] AC 1 at 25 where Lord Wright said:

> *"...in strict legal analysis, 'negligence' means more that heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty is owing..."*

[39] She referred to the case of **Walcott v Attorney General** (1978) 27 WIR where the court dealing with Sec 6 and 21 of the Main Roads Act, at page 190 said:

> *" A duty to take care must be established by the plaintiff which he had failed to do. The defendant owes no such duty as s.6 together with s.21 of the Main Roads Act confer only a power on the Chief Technical Director to carry out certain functions in relation to main roads, and places no duty on him. This is so because these powers are subject to the availability of funds voted by Parliament – funds which he receives through the Minister..."....*

[40] Counsel submitted further, *inter alia*, that the evidence leads to the conclusion that there has been an omission on the part of NWA which amounts to nonfeasance and based on the common law, the NWA has immunity from liability.

[41] With regard to whether the defendant was liable for negligence or breach of statutory duty, Counsel noted that the claimant cannot recover if the cause of the damage is left in doubt or is attributable "with equal reason" to some cause other than the defendant's negligence.

[42] Counsel indicated that the common law duty which the defendant has is based in nuisance so it was "an absolute duty to maintain, not merely a duty to take reasonable car to maintain".

[43] In relation to the cause of the damage to the claimant, Counsel indicated that it has to be established that the defendants owed a duty of care to the claimant and that the defendants were in breach of that duty and that she suffered damage for which the defendants are liable in law.

[44] She noted that the claimant claims that the trauma she suffered as a result of the fall has caused soft tissue sarcoma, myxoid spindle cell sarcoma, amputation of the left leg and questioned whether it can be said that a, or any breach of duty is the cause of the damage, myxoid spindle cell sarcoma, should the court disagree with the defence of non feasance.

[45] Counsel examined the reports of the expert witnesses and indicated that the "consistent train of thought from all the experts is "while trauma may draw attention to a tumour, it is not a causative agent for sarcomas". She then submitted that the claimant has not shown that the alleged breach of duty caused the damage.

Analysis and findings

[46] In her Particulars of negligence, the claimant refers to failure of the defendant, to *inter alia*, "... cover the manhole... inspect ...manholes... properly seal the manhole"

[47] The subject matter has been described during the proceedings as manhole, drainage, drain and storm water drain. The defendant's witness however describes it as a drain. It is the NWA which has responsibility for its maintenance, so I accept the evidence of the defendant that it is a drain. Regardless of the nomenclature ascribed to

it, however, it is not in issue that at the material time the 1st defendant had responsibility for managing and maintaining Penn Street, including the drain in question where the claimant claims she fell and sustained injuries leading to her claim for damages.

[48] Section 6 of the Main Roads Act confers on the Chief Technical Director the power to, *inter alia*, lay out, make, widen, alter, deviate, repair, maintain, superintend and manage main roads, while section 21 of the Act gives details of these powers. These powers are now vested in the Chief Executive Officer of the NWA by virtue of the Chief Technical Director (Transfer of References) Act 2000.

[49] The claimant has a duty to prove on a balance of probabilities that the NWA has breached some duty it owed to her, acted negligently or in breach of its statutory duty and it resulted in the injuries claimed.

[50] It is established that at common law, a public authority such as the NWA, is not liable for damage occurring on the highway unless the damage is caused by an act of misfeasance on its part or by having carried out repairs in a negligent manner. If the authority fails to carry out its statutory functions and responsibilities to repair roads, gullies, drains, etc. and that resulted in injury to a road user, it is guilty of nonfeasance and would therefore not be liable for the injury caused by that failure.

[51] In the case of **Sunbeam Transport Limited v The Attorney General, Lorna Smith et al v Sunbeam Transport Ltd.,** a case referred to by both Counsel, Wolfe J. (as he then was) applied the above principle when he found that the highway authority was not responsible for injuries and death arising out of the collapse of a roadway causing a bus to plunge into a gully. He referred to the writing of the learned author of **Salmond on Torts**, 12th Edition, where at page 238 he stated the law as follows:

> *"...No action will be against any authority entrusted with the care of highways for damages suffered in consequence of the omission of the defendants to perform their statutory duty of keeping the highway in repair. This exemption extends only to cases of pure nonfeasance and the public authority is responsible for any active misfeasance by which the highway is rendered dangerous.*

[52] I accept the evidence of the claimant that she fell into the drain and therefore find it necessary to determine, if she sustained injuries from the fall, whether it was a result of misfeasance or nonfeasance.

[53] I agree with Counsel for the Claimant that the uncontradicted evidence is that the Claimant fell into the relevant drain and although there is some amount of inconsistency in the evidence of the claimant and her witness in relation to dates, I accept that the claimant attended the Comprehensive Health Centre sometime thereafter and was treated, and that in September 2000 she was admitted to the Kingston Public Hospital. I find, in view of the medical evidence presented, that Ms Graham now has some permanent disabilities.

[54] The evidence is that at the time of the incident the covering of the drain was loose, zinc had been placed over it and the claimant stepped on the zinc to go across. There is also evidence of failure by the defendant to take any steps to secure the loose covers and failure to carry out regular inspection over a period of time. This evidence, which I accept as true, shows that there was the need for repairs.

[55] Counsel for the claimant has put forward argument that the defendant is guilty of misfeasance for having the manhole covers in the state it was when the incident occurred. There is however no evidence to prove that the defendant or any of its servants engaged in maintaining or in the repair of the drain in question, knew of the loose drain covers or had done any repairs to it and had done so negligently.

[56] Facts relating to installation, maintenance and repair would lie within the knowledge of the defendant and there is no evidence of the defendant having carried out any installation, maintenance or repair of the drain in a negligent manner. The only evidence in relation to the condition of the drain after the incident is that in 2010 repair work was done.

[57] I accept that whether any act or omission constitutes a misfeasance is a question of fact and I find that there is nothing on the evidence which disclose misfeasance on the part of the defendant. It has not been shown that the defendant carried out any installations or repairs in relation to the drain in question at any time or that they failed to

properly secure the covers. I do not believe I can even deduce misfeasance from the fact that the defendant did nothing to remedy the state of affairs as the claimant claims to have obtained on the day in question, therefore there would only be nonfeasance.

[58] On the issue of whether the 1st defendant is negligent, it is well established that the claimant has the burden to prove on a balance of probabilities that the defendants have breached some duty owed to her, have acted negligently and that the injuries which she has suffered arose as a result of this breach.

[59] It is accepted that the defendant and its predecessors had placed the drain and the cover on the roadway. In keeping with the power conferred on it, the defendant should maintain them in safe conditions and keep them free from defects which are likely to make them a source of danger to the users of the road who would be the persons most immediately affected by any failure to adequately maintain them. Additionally, the defendant should endeavour that the drain is kept securely covered and sealed and should have in place a system whereby inspections are carried out to ensure that the drains were sufficiently secure for all road users.

[60] From the evidence it is clear that the 1st defendant failed to carry out the maintenance and security of the drain along Penn Street, a public road, for which it had specific responsibility. There is no evidence that the 1st defendant ever took any steps to ensure that the covers were in place or that it was ever cleaned, so I cannot agree with Counsel for the claimant that the 1st defendant carried out a careless act in respect of the Penn Street drain in that it was improperly sealed, which rendered the work imperfect and incomplete which could point to negligence on their part.

[61] What was also clear from the evidence was that the claimant was well aware of what appears to have been a defective drain in front of her gate and she has been walking on it for several years prior to the incident leading to the making of this claim..

[62] In a case of **Mavis Smith v The Chief Technical Director and the Attorney General, Claim** No. CL 2002/S094, unreported, delivered March 6, 2009, Mangatal J, had this to say:

"I think the best explanation of the law as it stands is that provided in **Griffiths v Liverpool Corporation.** At pages 1021-1022, Lord Diplock discusses the matter as follows:

> "*The duty which at common law rested on the inhabitants at large to maintain the highways in their parish, was long ago transferred to local authorities acting as highway authorities and has become a statutory duty currently imposed by s.44(1) of the Highways Act, 1959. The duty at common law to maintain, which includes a duty to repair a highway, was not based in negligence but in nuisance. It was an absolute duty to maintain, not merely a duty to take reasonable care to maintain, and the statutory duty which replaced it was absolute. At common law the duty, being a duty to the public, was enforceable by indictment, but its rigour was reduced by another rule of common law that a private individual who suffered damage as a result of a highway's being out of repair could not recover damages in a civil action against the inhabitants at large if the lack of repair was due to mere failure to repair (that is nonfeasance), and not to acts of repair or other acts in relation to the highway improperly performed (that is misfeasance)"*

[63] I accept that the law as explained in the case of **Griffiths** is still holds good in our jurisdiction today. The 1st defendant having failed to do what it ought to have done is guilty of nonfeasance and by virtue of the common law principle is exempt from liability to the claimant in the circumstances. In short, public bodies like the NWA with powers conferred on them for the management of highways are not liable for the consequences arising from their permitting the drain to be in an insecure or dangerous condition.

[64] I therefore find it unnecessary to discuss the question of causation.

[65] In light of the foregoing there will be judgment for the defendant.

[66] On the question of costs, the general principle is that a successful party should have his costs paid by the unsuccessful party. There shall therefore be costs to the defendant to be agreed or taxed.