HIGHWAY AUTHORITY | STATUTORY DUTY

Karpasitis v Hertfordshire County Council

King's Bench Division
20 October 2023
Vikram Sachdeva KC
(sitting as a deputy High Court judge)
[2023] EWHC 2614 (KB)
[2023] PLSCS 177

Highway authority – Breach of statutory duty – Negligence – Claimant injured when falling from bike after hitting hole in grass verge beside path – Claimant seeking damages from defendant highway authority – Whether defendant in breach of duty under section 41 of Highways Act 1980 – Whether defendant in breach of common law duty to signpost path – Claim dismissed

In April 2020, the claimant was riding his bike on a path to the east of the A10 dual carriageway. It was separated from the A10 by a grass verge. Travelling at around 10mph, he decided to overtake a jogger, which required him to cycle on the grass verge. Unfortunately, there was a hole in the verge which was sufficient to throw the claimant from his bicycle. That caused a fracture of the second vertebra, with serious consequences said to flow from the accident, including the loss of his job.

The defendant was the highway authority in respect of the grass verge (as well as the adjoining footway and carriageway) where the claimant fell. The claimant brought an action claiming damages against the defendant for personal injury sustained by him.

Section 41 of the 1980 Act imposed a duty on the highway authority reasonably to maintain and repair a highway maintainable at public expense so that it was free of danger to all who used it in a way normally to be expected.

The claimant alleged the defendant was in breach of section 41 in that it had failed, adequately or at all, to heed the "obvious" risk that the hole posed to users of the cycleway/footpath. The claimant also alleged that the defendant was in breach of a common law duty to signpost the path as a footpath.

Held: The claim was dismissed.

(1) Section 41 created an absolute duty to maintain the highway. That included works of repair and measures to obviate the need to repair, to forestall the development of a defect in the road which would, if allowed to develop, require remedial action. The standard of maintenance was measured by considerations of safety. The obligation was to maintain the road so that it was safe for the passage of those entitled to use it. The question was whether the particular spot where the claimant fell was dangerous. In every case, it was a question of fact and degree whether any particular state of disrepair entailed danger to traffic being driven in the way normally expected on that highway: *Burnside* v *Emerson* [1968] 1 WLR 1490, *Rider* v *Rider* [1973] 1 QB 505, *James* v *Preseli Pembrokeshire District Council* [1993] PIQR P114 and *Goodes* v *East Sussex County Council* [2000] EGCS 75; [2000] 1 WLR 1356 considered.

The duty under section 41 did not extend to the provision of information by way of street furniture or painted signs. Nor did it create liability for the layout of the highway. The "structure" of the road was nothing more than the physical surface. In deciding whether there was a danger, the court was entitled to take into account the reasonable expectations of the public as to the standard of maintenance of the highway surface. Whether a hole was dangerous was primarily a question for a highway inspector's individual assessment and judgment: *Mills* v *Barnsley Metropolitan Borough Council* [1992] PIQR P291, *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 and *Thompson* v *Hampshire County Council* [2005] LGR 467 considered.

(2) In the present case, the path had been formally designated by the defendant as a footway, and that status had not been varied. There was other evidence that it was a footway, in particular its narrow width (1.2m), its slightly undulating nature, and the lack of signposts and/or markings indicating that it was a shared cycleway and footway. The mere fact that cyclists in fact used it, and the lack of an "End of Route" marking or sign was insufficient to change its status.

On the facts of this case, stepping on to or cycling onto the grass verge was a normal user of the highway, and the public had a reasonable expectation that substantial holes in the verge would be repaired within a reasonable period of their discovery. Such substantial holes constituted the sort of danger which an authority might reasonably be expected to guard against. In all the circumstances, the defect was dangerous as of 22 April 2020.

It was clear that the defect in the highway caused the accident, by causing the claimant to fall from his bicycle. As to the common law claim, if a "No cycling" sign had been erected, the claimant would not have attempted to cycle on the footway, and the accident would not have occurred. Accordingly, causation in respect of both the statutory and common law claims was made out.

(3) Under section 58 of the 1980 Act, in an action against a highway authority in respect of damage resulting from its failure to maintain a highway, it was a defence 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 related was not dangerous for traffic. The burden to establish the defence lay squarely on the defendant. Its general policy of biannual walked inspections of the footway and verge was in accordance with national guidance and lawful.

There was contemporaneous documentary evidence that an inspection was performed on 13 February 2020, which did not detect a hole, although it noted other defects. That alone was persuasive evidence that an inspection was performed on that day and no hole was found. There was no other reason to consider that the inspection was anything other than competent. The court's assessment of the evidence in the round was that the defendant had satisfied the burden of proving the section 58 defence. Therefore, the defendant was not liable under section 41 of the 1980 Act.

(4) For liability in common law to arise, the defendant must have committed a positive act which adversely affected the risk to users of the highway. There was no authority suggesting that misfeasance or an omission by the defendant gave rise to a common law duty of care.

There was no evidence that the defendant had committed any positive act. Omitting to erect a sign indicating that cycling was not permitted was an omission. There was therefore no liability in negligence.

Martin Porter KC (instructed by Fieldfisher LLP) appeared for the claimant; Adam Weitzman KC (instructed by DWF Law LLP) appeared for the defendant.

EILEEN O'GRADY, BARRISTER

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