

Notice of Judgment hearing

In the County Court at
Oxford

Claim Number A96YP099

Date 23 February 2017



MR NICHOLAS ROGERS

1st Claimant

Ref

MP/ROGERS/NAH/038657

OXFORDSHIRE COUNTY COUNCIL

1st Defendant

Ref JQM MAW 2000538 30

TAKE NOTICE that the Judgment hearing will take place on

1 March 2017 at 10:00 AM

at the County Court at Oxford, St Aldates, Oxford, OX1 1TL

When you should attend

15 minutes has been allowed for the Judgment hearing

Please Note: This case may be released to another Judge, possibly at a different Court

The court office at the County Court at Oxford, St Aldates, Oxford, OX1 1TL. When corresponding with the court, please address forms or letters to the Court Manager and quote the claim number. Tel: 01865 264200 Fax: 0870 739 5995. Check if you can issue your claim online. It will save you time and money. Go to www.moneyclaim.gov.uk to find out more.

D W F Llp, Solicitors
20 Fenchurch Street
London
EC3M 3AG
DX 584 LONDON

IN CONFIDENCE

This is a judgment to which the Practice Direction supplementing CPR Part 40 applies. It will be handed down at 10am on 1 March 2017. This draft is confidential to the parties and their legal representatives and accordingly neither the draft itself nor its substance may be disclosed to any other person or used in the public domain. The parties must take all reasonable steps to ensure that its confidentiality is preserved. No action is to be taken (other than internally) in response to the draft before judgment has been formally pronounced. A breach of any of these obligations may be treated as a contempt of court. The official version of the judgment will be available from the County Court Office once the judge has approved it.

The court is likely to wish to hand down its judgment in an approved final form. Counsel should therefore submit any list of typing corrections and other obvious errors in writing (Nil returns are required) via email to the County Court at Oxford no less than 24 hours before the date of handing down so that changes can be incorporated, if the judge accepts them, in the handed down judgment.

Case No: A96YP099

IN THE COUNTY COURT AT OXFORD

St Aldates, Oxford OX1 1TL

[Draft Date: 22/02/2017]

Before:

HER HONOUR JUDGE MELISSA CLARKE

Between:

NICHOLAS ROGERS

Claimant

- and -

OXFORDSHIRE COUNTY COUNCIL

Defendant

Mr James Weston (instructed by Quality Solicitors Lawrence Hamblin) for the **Claimant**

Mr Harding (instructed by DWF LLP) for the **Defendant**

Hearing date: 12 December 2016

DRAFT JUDGMENT

<p>If this draft Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.</p>
--

Her Honour Judge Melissa Clarke:**Introduction**

1. The High Street of Thame, Oxfordshire, bisects the town from the Oxford Road in the north west to the Chinnor Road in the south east. It is a busy road, lined with shops and popular with pedestrian shoppers. About half way along its journey it splits in two to straddle the town hall, which sits on a spit of land between the two roadways. Some of that spit of land is given over to car parking but it remains bounded by pavement to enable pedestrians to walk from the parked cars to the town hall without entering either roadway. This pavement is, inevitably, also used as a landing spot for those crossing from one side of the split High Street to the other.
2. On the morning of Saturday 17 December 2011 the Claimant, at that time 61 years old, drove into Thame to run some errands. It was the last Saturday before Christmas and the High Street was already busy with shoppers. He parked outside the Masonic Hall, walked down to Newitt's butchers, and then crossed the south section of the High Street, intending to visit the shops on the north section of the High Street. As he mounted the pavement of the central section, his leading foot slipped, he says on untreated ice, and he fell heavily on his right hip and right elbow. He was assisted to rise and sit on a bench by some passers-by. He called his wife who collected him in her car and drove him to hospital where it was found that he had fractured his right hip. In medical terms, he had suffered a comminuted fracture of the right greater trochanter, extending into the intertrochanteric region. He also had extensive bruising and swelling of the hip area and bruising and deep tissue contusion of

his right elbow. No surgery was required and with rest, pain management and physiotherapy he eventually made a good, but not a full, recovery.

3. It is common ground that the Defendant is the highway authority for the pavement on Thame High Street, and that it must comply with, inter alia, section 41 of the Highways Act 1980 ("the Act").
4. There is no dispute that the morning of the index accident was very cold and frosty. The Defendant had taken the decision to grit roadways in accordance with its Winter Maintenance Policy, including Thame High Street, the night before. It did not grit or salt the footways because it does not, pursuant to that policy, pre-treat footways for snow or ice.
5. The Claimant's case is that the Defendant's failure to grit or salt the pavement on which he slipped was (i) causative of his accident and (ii) a breach of its statutory duty pursuant to section 41 of the Act. He also pleaded his claim in nuisance and negligence but these were not pursued at trial.
6. The Defendant denies breach of statutory duty relying in particular in the defence afforded by the wording of section 41(1A) of the Act. It puts the Claimant to proof on causation and alleges contributory negligence by the Claimant.
7. Quantum of damages having been agreed, I am asked only to determine liability.
8. At trial Mr Weston represented the Claimant and Mr Harding represented the Defendant. I had the benefit of concise and very helpful skeleton arguments from both counsel, for which I thank them.

Law

9. For the purposes of this case, it is subsections (1) and (1A) of Section 41 of the Act which are relevant. They provide:

“41 Duty to maintain highways maintainable at public expense.

(1) The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty, subject to subsections (2) and (4) below, to maintain the highway.

(1A) In particular, a highway authority are under a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice.

...”

10. Subsection (1A) was added to section 41 with effect from October 2003. It is common ground that it was inserted into section 41 by Parliament to deal with, and effectively reverse, the finding of the House of Lords in Goodes v East Sussex County Council [2000] 1 WLR 1356, which held that the duty of a highway authority under section 41(1) did not extend to preventing, removing or mitigating the presence of snow or ice on the highway.
11. The Claimant accepts, therefore, that in this case the Defendant has no liability under section 41(1), which is an absolute duty, and that any liability of the Defendant in the facts of this case, as pleaded, can only arise pursuant to a breach of section 41(1A), which is qualified by the defence of reasonable practicability. I say ‘as pleaded’ because the Defendant does not plead any defence under section 58 of the Act.

12. It is common ground that the burden of proof is on the Claimant to prove to the civil standard that his safe passage along the highway was endangered by snow or ice. If he succeeds in doing so, the burden then shifts to the Defendant to prove to the same standard that it was not reasonably practicable to prevent that endangerment.
13. I will deal with the law further as necessary on an issue by issue basis.

Issues

14. I gratefully adopt the list of issues set out in Mr Weston's skeleton argument:
- i) Did the presence of snow or ice on the highway cause the Claimant's accident?
 - ii) Was the Claimant's passage on the relevant highway endangered by the snow or ice?
 - iii) Did the Defendant ensure, so far as reasonably practicable, that the Claimant's passage on the highway was not endangered by snow and ice?
 - iv) Contributory negligence.

Witnesses

15. The Claimant relies on three witnesses: himself, Mr Robert Probets and Mr Paul Clarke. Each filed a witness statement. The Claimant and Mr Probets attended court and were cross-examined. Mr Clarke did not attend because he has moved house and the Claimant has lost contact with him. Accordingly his

evidence could not be tested in cross-examination. A civil evidence act notice was filed in relation to his non-attendance.

16. The Claimant gave evidence about the accident and its aftermath. His witness statement dated 13 February 2016 was sparse of detail about the accident itself. He described the central pavement where he slipped as paved with old, smooth slabs. He said at paragraphs 6 and 7 of his witness statement: “I slipped on ice which had built up from the night before. It was not snow it was ice. I refute any suggestion that I wasn’t proceeding with care as has been suggested in the Defence. There had been snow fall in the area generally on the previous day as well”. The majority of the rest of his witness statement dealt with his opinions about the Defendant’s gritting policy rather than evidence of fact.
17. In oral evidence he provided further detail. He distinguished between the condition of that central paved area where he fell and the condition of the pavements on the south side of the High Street, between where he parked his car and M. Newitt and Sons butcher’s shop. He said that he had no problem at all with negotiating the south pavement, he didn’t slip on it and he assumed it wasn’t icy. But he said the central pavement was different, of different construction, and he slipped on it with the very first step he attempted to take onto it from the road. He described it “like a sheet of glass, like a sheet of ice”. He said: “the whole area was icy, children were sliding, playing on the bottom bit of the central paved area. I noticed them as I was crossing the road”. When further questioned, he thought the ice extended across the whole pavement, perhaps 4 to 6 feet, but on further questioning accepted that he fell at the very

edge, with his first step off the road, and thereafter did not pay particular attention to the extent of the ice because he was overcome with pain or shock. He thought he recollected some snow on the ground but accepted in cross-examination that he might be wrong about that, as he couldn't remember actually seeing snow. He said "whatever it was, I slipped on it". I will deal with my view of his credibility and reliability during my review of his evidence.

18. Mr Robert Probets is the under-manager of M. Newitt & Sons butchers. He gave evidence about the general conditions of the pavements on his side of Thame High Street on the morning of the accident. He saw the Claimant cross the road onto the central pavement, slip and fall. He said "immediately a number of people gathered around him to help". He did not go over himself, so he could not assist the court with the condition of the central paved area where the accident occurred. His evidence was that his side of the High Street was very slippery in parts when he came to work in the early hours of that morning, but he had not slipped because his work footwear had special non-slip soles. In his written evidence he said he was "pretty sure" snow had fallen the night before but on being shown evidence in cross-examination that suggested there had been no snowfall, he accepted that he might be wrong. He also gave evidence about gritting: stating that his business did not grit the area outside the shop; and that sometimes Thame Council would grit the pavements by means of a "chap with a shovel" spreading grit from a slow moving Thame Council-branded lorry. He described that as sporadic. I have no doubt that Mr Probets was an honest, credible and reliable witness who gave his evidence to the best of his recollection.

19. Mr Paul Clarke is an acquaintance of the Claimant who came across him shortly after the accident, when the Claimant was sitting on a bench in the central area to which he had been assisted by passers-by. In his witness statement dated 15 February 2016 he confirmed he did not witness the accident but confirmed that the High Street was icy and slippery and stated: "I can quite imagine how he would have slipped as the pavements in that area and location were very slippery and dangerous. I remember almost slipping over myself on at least one occasion." As I have mentioned, Mr Clarke was not at court and so his evidence could not be challenged. I will assess the weight that I give his evidence as I review it.
20. The Defendant relies on two witnesses, Mr Kevin Haines and Mr Paul Wilson. Mr Haines is the Highways Asset Manager in the Highways and Transport department of the Defendant. He gave evidence about the production, implementation and review of the Defendant's highways policies including its Winter Maintenance policy. Mr Wilson is the Highway Network Resilience Coordinator responsible for winter maintenance, adverse weather and incidents on the highway network for the Defendant. He gave evidence about the decisions that he took about the salting and gritting of the highway network on 16 December 2011, the night before the accident and the policies, meteorological forecasts and factors upon which he based those decisions. He also gave evidence about practical issues arising from the winter maintenance policy and winter weather. Each filed a witness statement and was cross-examined. They were not present for and gave no evidence about the accident itself. For reasons which will become apparent I do not find it necessary to assess much of their evidence but for the avoidance of doubt I found both of

them to be straightforward, honest and credible witnesses who assisted the court to the best of their ability.

Discussion and decision by issue

1. Did the presence of snow or ice on the highway cause the Claimant's accident?

21. There is no real dispute on this point. I am satisfied on the balance of probabilities that the accident was caused by the presence of ice on the pavement of the central section of the High Street for the following reasons:

- i) The evidence of all the witnesses is that it was icy underfoot generally that morning. The Defendants found it necessary to grit the roads. Mr Probets and Mr Clarke both describe the conditions of Thame High Street generally as "slippery".
- ii) I found the Claimant's evidence that his foot slipped on ice on the first step he took onto the central pavement to be compelling. There is no evidence before me which would support a contention that the Claimant's perception of slipping on ice, or his recollection, was mistaken, and Mr Harding does not attempt to make such a submission for the Defendant.

2. Was the Claimant's passage on the relevant highway endangered by snow or ice?

Law

22. It is common ground that whether safe passage along a highway is 'endangered' by snow and ice involves consideration of whether the relevant part of the highway poses a reasonably foreseeable risk of injury which is the

sort of danger that a local authority must reasonably be expected to guard against. Both parties rely upon the guidance provided by Laws LJ, with whom Longmore LJ and Richards LJ agreed, in Jones v Rhondda Cynon Taff County Borough Council [2008] EWCA Civ 1497, a case involving a claim under section 41(1) of the Act (not section 41(1A)) that an eroded footpath caused the claimant injury. Laws LJ said at paragraph 11 of his judgment:

“Section 41 has been said to impose an absolute duty, but the term ‘absolute’ in my opinion has with respect to be treated with care. There is a risk of it suggesting that the duty is to maintain the highway to such a standard as in effect to guarantee the safety of its users, and it is plain that that is by no means the measure of the duty; it is absolute only in the sense that it is not merely a duty to take reasonable care but to maintain the highway to an objective standard. The statute does not state what the standard is. The authorities, however, are as it seems to me, clear as to the nature of this standard. The highway has to be maintained in such a state of repair that it is reasonably passable for the ordinary traffic of the neighbourhood without danger caused by its physical condition.”

23. At paragraph 12 he went on to state:

“Foreseeability of harm will not of itself entail the conclusion that the highway is unsafe. As Lloyd LJ said in James v Preseli Pembrokeshire District Council [1993] PIQR 114 at 119: “In one sense it is reasonably foreseeable that any defect in the highway, however slight, may cause an injury but that is not the test of what is meant by dangerous in this context. It must be the sort of danger which an authority may reasonably be expected to guard against.””

24. Mr Harding reminds me that this is not self-proving. He submits, and I accept following Jones v Rhondda, that the fact that the Claimant slipped and fell on

ice is not sufficient to reach a finding that the central pavement posed a reasonably foreseeable risk of injury which is the sort of danger that a local authority must reasonably be expected to guard against. It is one piece of evidence that I must weigh when considering whether the Claimant has satisfied the burden of proof on this point. I must consider the extent of the ice in the context of the type and manner of use of the pavement to determine whether it is the sort of danger that the Defendant must reasonably be expected to guard against.

Evidence and findings

25. The Claimant has put before me very limited evidence upon which I can safely rely in order to determine this issue. The part of the highway that I am concerned with is that central pavement, not Thame High Street generally. I have very little evidence about the danger posed by snow and ice on the central pavement.
26. I have the evidence of Mr Probets that the south side of Thame High Street was slippery underfoot that morning, although the Claimant's oral evidence was contradictory: that he didn't think it was particularly slippery underfoot because he didn't slip on it. Mr Probets cannot tell me what the central paved section was like because he did not go onto it.
27. Mr Clarke's untested written evidence is, in my judgment, unclear. If he had attended court I hope he would have been asked to clarify what he meant when he said "the pavements in that area and location were very slippery and dangerous. I remember almost slipping over myself on at least one occasion". Was "that area and location" referring to the central pavement or Thame High

Street generally? If the former, was he referring to all of it or just the patch where the Claimant fell and if so how extensive was the ice? Did he almost slip over on the central pavement, the road, or the north or south pavements of the High Street? I cannot know what his answers to these questions would have been. Accordingly I cannot give his evidence any significant weight, save that it generally corroborates that it was slippery and icy underfoot on parts of Thame High Street that morning.

28. The Claimant's evidence gives me some concerns. First, his witness statement is dated more than 4 years after the accident and it provides almost no detail of the type or extent of ice or snow on the pavement upon which he fell. One would expect his recollection, although dimmed by the effluxion of time, to be greater at the time of the production of his witness statement than at trial some 10 months later. However, his oral evidence he provided considerably greater detail. In particular, his evidence in cross-examination was the first time he described the central pavement as being like "a sheet of ice", or "a sheet of glass". It was the first time he described the ice covering the full width of the pavement in the area where he fell. It was the first time he said that children were sliding on ice further down the central pavement.
29. In my judgment, his description of that part of the pavement on which he slipped as being like a "sheet of glass" or a "sheet of ice" is difficult to reconcile with a description of there also being snow underfoot, and the Claimant's evidence on this point has changed a number of times. In his witness statement he made an unequivocal statement that he slipped on ice not snow, whereas in his oral evidence he said he thought there was snow

underfoot, and then accepted that he could not remember specifically seeing any. In the medical report of Mr Chugtai, the doctor reports being told by the Claimant upon examining him in July 2013 that he “slid on an untreated surface after snow and frost had fallen the previous day”. This account is closest in time to the accident and perhaps represents the best recollection of the Claimant but it does not, in my judgment, accord with the description of ice like a sheet of glass. The weather evidence before me suggests that no snow had fallen, although Mr Probets also thought there was some snow on the ground. I do not consider it necessary to make a finding about whether there was snow on the ground or not. However, in my judgment the Claimant’s shifting position on this point, together with his statement in cross-examination that “whatever it was, I slipped on it”, suggests that he has no reliable memory of the pavement being “like a sheet of glass” and I so find.

30. This finding is corroborated, in my judgment, by the fact that he accepted in cross-examination that he fell immediately upon mounting the pavement and the shock of that fall prevented him from paying much attention to the state of the wider pavement. I consider this admission to have contradicted the evidence he had just given that the ice extended the full width of the central pavement. Accordingly I also find that his oral evidence of the extent of the ice on the pavement is unreliable.
31. Finally, his evidence that he remembers children sliding on ice further down the central pavement was given immediately upon being challenged about his ability to speak to the extent of the ice, given his immediate fall. The manner in which he gave it suggested to me that he was seeking to explain and justify

the evidence that he had just given about the sheet of ice stretching the full width of the pavement, when it was clear that was evidence that he was unable reliably to give. Of course, whether children were sliding further down the central pavement cannot be determinative evidence of the state of the pavement where the Claimant slipped, but if reliable I accept it could, potentially, provide an indication of the likely level of iciness of the pavement upon which he fell. Accordingly I have considered this evidence very carefully. However the fact that it has been provided so late in the day, the lack of detail in his description of those children and what they were actually doing, and the manner in which it was given has satisfied me that this evidence is also something upon which I cannot rely in drawing an inference of the extent of the iciness of the area of pavement upon which the Claimant slipped.

32. In making those findings I do not consider that the Claimant came to court to lie or give deliberately dishonest evidence. Rather I consider that by replaying and reliving in his memory the events of his fall over some 5 years, in the context of this litigation, and seeking to explain and understand it in his own mind over that time, that his evidence has become somewhat embellished because he has become unable to accurately distinguish what he actually recollects and what he thinks must have been the case. However the fact that I have found so much of his oral evidence to be unreliable means that I am left with little to no evidence from the Claimant about the extent of ice or snow on the central pavement and therefore whether it posed a reasonably foreseeable risk of injury and was the sort of danger that a local authority must reasonably be expected to guard against.

33. What other evidence is there before me that supports the Claimant's case or, alternatively, undermines it?
34. There is little evidence of any weight before me that any other pedestrians were having difficulty with ice on that central part of the High Street, despite the fact that all the witnesses agreed that the morning of the accident, the last Saturday before Christmas, was very busy with pedestrian traffic. I am satisfied that those pedestrians were busily using the central pavement as well as the north and south footways of the High Street, as Mr Probets' eye-witness evidence was that as soon as the Claimant fell he was immediately assisted by a number of passers-by.
35. Both the Defendant's witnesses and Mr Probets were asked whether they had received any complaints or comments from members of the public about icy pavements that day. All denied it. In particular, I note the evidence of Mr Wilson that there were no calls or complaints to the Defendant's complaint line about ice, and no record that there were any other accidents, on that part, or any part, of Thame High Street the day of the accident, the day before or the day afterwards. I accept that evidence.
36. I acknowledge some force in Mr Weston's submission for the Claimant that there is no evidence of how that complaints line was publicised or advertised or even if details of how users could contact it were posted on the website. However, I accept Mr Wilson's evidence that calls and complaints were periodically made on that line by the police or members of the public about icy footpaths, so the fact that none were made on this day is evidence of some

relevance that I take into account to the Claimant's detriment. I put it no higher than that.

37. Finally I take into account the fact that the Claimant slipped not while proceeding along the footway, but while stepping up onto the edge of it from the roadway after crossing the High Street otherwise than at the designated crossing, which was some few metres further up the road. The fact that there was, undoubtedly, some ice there upon which the Claimant slipped does not tell me what the state of the footpath was for those pedestrians proceeding along it in the usual way. Of course it is reasonably foreseeable that people might cross the road otherwise than at a crossing point – we have no laws against jaywalking in this country – but it must be the case that the danger posed by ice or snow at a designated crossing point or lying extensively upon the central, more highly used portion of a pathway is greater than that at the very edges of the pavement away from a crossing point. Accordingly the position and extent of the ice is a significant factor in determining dangerousness. In fact, this point was also made in Jones v Rhondda, where in that case a significant erosion at the very edge of a lightly used dead-end path leading nowhere in particular was held not to be a breach of section 41, whereas the same depression on the main section of a path, or a path more heavily used, would have been.

Conclusion

38. The conclusion that I am forced to is that the Claimant has failed to satisfy me on the balance of probabilities that his safe passage along the footpath was endangered by snow and ice. Although it might be reasonably foreseeable that

any scrap of ice, no matter how small, might cause an injury, this is not the test as Jones v Rhondda makes clear. I cannot find, in the absence of reliable evidence about the position and extent of such ice, that the danger posed by the ice upon which the Claimant slid and fell was that which the Defendant might reasonably be expected to guard against.

39. Accordingly I will not go on to consider issues 3 and 4 being the second limb of reasonable practicability and contributory negligence. The claim must fail.
40. I know this will be very disappointing to the Claimant and I hope he understands that my judgment in no way seeks to diminish the undoubted pain and suffering that I accept has been caused to him by his accident. However it is not an accident, in my judgment, for which he has satisfied me that the Defendant is liable.
41. This judgment will be handed down at 10am on 1 March 2017. If the parties are able to agree an order and there are no consequential matters arising, they should please file the agreed order by 4pm on 27 February 2017 and their attendance at the handing down will not be required. Otherwise, the handing down will be listed for half an hour.