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Judgment Book

[2012] JMSC Civ 149

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 04846

BETWEEN	CHRISTINE BROWN	CLAIMANT
AND	THE ATTORNEY-GENERAL OF JAMAICA	DEFENDANT

Alexander Williams for the Claimant

T. Dixon-Frith, S. McLean and N. Gayle instructed by Director of State Proceedings for the Defendant

Heard: November 29, 30; December 1, 2011; March 9 and October 17, 2012

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

Lawrence-Beswick J

[1] The claimant, Ms. Christine Brown, alleges that she stepped onto a sewer grating and injured her foot. In this action, the claim form indicates that the claim is against the Attorney General (“The AG”) for non-feasance, mis-feasance and/or for negligence in repairing or maintaining the grating which caused her injury but her Counsel states that no reliance is being placed on non-feasance, i.e., neglect to maintain the roadways, but rather, that a defective grating was brought onto the road and caused injury to her.

- [2] The AG is sued pursuant to the Crown Proceedings Act. The agency of the State directly concerned is the National Works Agency ("the NWA"). The NWA is an executive agency of the Ministry of Housing & Works with responsibility to maintain and repair roadways and sewer and storm gratings, including the grating in question.

The AG's defence is that the grating had had no repair work done on it and that it was reasonably safe for all road users including the claimant. They are therefore not responsible for the claimant's injuries, if she did in fact have injuries.

Background

- [3] On May 28, 2007, the rain fell very heavily causing Ms. Brown to take shelter under the piazza of the Mother's store on King Street. The street was full of water. The downpour did not abate and Ms. Brown, tired of waiting, stepped out into the road to continue about her business. She could not see the surface of the road below the water.
- [4] She alleges that as she stepped into the water on the road, her foot became trapped. It went into a hole at the bottom of which was a storm grating which trapped it. She could not see the grating. In cross-examination, she said that she stepped down on a piece of the grill which was broken off in the middle and her foot fastened there.
- [5] She alleges that her foot remained so trapped for three hours. Neither she nor any passersby wished to place their hand into the dirty water to release her. She describes the foot as being painful and as being surrounded by dirty water containing debris and glass. It was not until someone made mention of the inevitability of cutting the grating to release her that she grabbed the foot and was able to wrench it free.
- [6] She received medical attention at the hospital and for months following from private doctors. This resulted in her recovery to some extent from the injuries

which she alleges she sustained in the incident. Two medical reports are in evidence describing soft tissue injury and permanent injury to her foot and leg.

- [7] The NWA has no record of the grating being defective or that it was repaired prior to or soon after the claimant's fall. The NWA alleges that it conducts weekly examinations of the grating in question. The evidence is that when conducting these weekly inspections, the inspector remains in his car and looks at the grating from that vantage point, sometimes whilst the car is in motion.

NWA alleges that it inspected the grating on May 25, 2007 – three (3) days before the incident, and again the week following the incident and that it was intact on those occasions. Indeed as late as September 12, 2008 it was inspected in the presence of the claimant and, according to the NWA, it was still intact. The NWA submitted inspection records to support those allegations. Ms. Brown, however, maintains that the grating was broken when she went to the inspection in 2008 and says that rubbish covered it.

Claimant's Submissions

- [8] The claim is based primarily on mis-feasance, the allegation being that what is described as the manhole cover was faulty, broken or not secured properly in place. Ms. Brown does not allege that there was a defect or non-repair of the roadway itself. The claim is based further on the contention that there was lack of reasonable care by the NWA and at the very least no sufficient steps were taken to secure the grating and/or manhole cover, in breach of duty to her.¹
- [9] Counsel for Ms. Brown submits that she fell into a manhole through a broken, dislodged or defective storm grating which was not properly secured. He argues that Ms. Brown was injured either from negligence of the NWA in breach of a duty owed to her, or in breach of its statutory duty and that mis-feasance should properly apply.

¹ **Griffiths v Liverpool Corporation** [1967] QBD 374 at 391

Defendant's submissions

- [10] Counsel for the AG submits that the NWA does not owe a duty of care to the claimant and was not negligent. It had done all that it was required to do at law and was therefore not liable to Ms. Brown even if she could prove that she had actually been injured.

Analysis

- [11] The claimant's pleadings refer to the grating involved as a sewer grating but the NWA asserts that it is a storm grating. Counsel for the claimant argues that it matters not what type of grating it is. Indeed reference was sometimes made to a manhole cover.

The evidence is that a storm grating allows water to flow through it. A sewer grating does not. In my view, the actual nature of the grating is important in the circumstances of this case. It is the NWA which is responsible for maintenance of the grating and I therefore accept the NWA's evidence that the grating in question was a storm grating. Such a grating is level with the roadway and forms part of the road.

- [12] The Main Roads Act² places the duty to make, repair, maintain and manage main roads on the Chief Technical Director. All the duties of the Chief Technical Director have now been vested in the Chief Executive Officer of the NWA by virtue of the Chief Technical Director (Transfer of References) Act 2000.

All parties have proceeded on the presumption that the road involved, King Street, is a main road within the meaning of the law.

- [13] However, it has long been established that at common law, a user of a roadway has very limited protection from injury resulting from the condition of the roadway. If the authority responsible for the roadway failed to maintain it and that resulted in injury to a road user, that is regarded as non-feasance and the authority would

²s.6

not be liable for injury caused by that failure. It is only if there were repairs done to the roadway and the repairs were negligently done, that is regarded as misfeasance and the authority would be liable for damages caused by that negligence.

- [14] Wolfe J. (as he then was) applied that principle when in **Sunbeam Transport Service Limited v. The Attorney General et al**³, he found that the highway authority was not responsible for injuries and death which occurred when a roadway inexplicably collapsed, causing a bus to plunge into a gully resulting in deaths. The learned Judge there referred to the writing of the authors of **Salmond on Torts**⁴ where they stated:

*"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 non-feasance and the public authority is responsible for any active mis-feasance by which the highway is rendered dangerous."*⁵

Learning supporting this principle is also to be found in **Winfield and Jolowicz on Tort**⁶ where, in discussing nuisance, the authors stated:

*"At common law a highway authority could not be liable for injury suffered by a user of the highway and resulting from the authority's failure to discharge its duty to keep the highway in repair. This immunity did not extend to mis-feasance on the highway nor to acts of repair improperly performed."*⁷

- [15] It is therefore critical to determine the cause of the injury to Ms. Brown, if there were in fact any injury, to ascertain if it resulted from mis-feasance or non-feasance.

³(1989) 26 JLR 1

⁴12th Edition

⁵ At page 238

⁶ 11th Edition

⁷ At page 394

[16] *Injury*

I accept that Ms. Brown was admitted to the Kingston Public Hospital on May 28, 2007 for soft tissue injury to her foot, and that she remained there overnight. I also accept that she subsequently received medical treatment for injury to the foot and leg and is now still suffering from the effect of injury to her foot and leg. I am therefore satisfied on a balance of probabilities that Ms. Brown's foot and leg were injured on May 28, 2007 and that she faces some permanent disabilities from that injury.

[17] *Cause of Injury*

What caused the injury? Ms. Brown's evidence was not precise. In her witness statement she said that she stepped forward with her right leg and stepped down just in front of the curb wall. As she started to take the next step she felt her right foot and leg go down into a hole. She noticed that the grating which covered the hole was actually broken and her leg had actually gotten "caught in a piece that was still in the hole and the edge of the hole itself". She did not see "the other piece of the metal grating".

In cross-examination, she said she felt her foot fasten in the grill where it was broken off. The grating was broken in the middle. After everything her foot went into a hole in the middle.

If this evidence is correct, it means that either something was already wrong with the grating when Ms. Brown stepped on it, or something went wrong at the time that she actually stepped on it. Clearly, it is important to establish which it was as this will help to determine if the issue is non-feasance or mis-feasance.

It follows that evidence of the details of the condition of the grating would have been helpful. Was the grating level with the road at all times, was there a break in it, was there any indication of wear and tear, had work been done on the grating or on the adjoining roadway, did it appear that work should have been done on it? What were the dimensions of the grating, and of any break that there

may have been? This evidence would assist to determine if the NWA had failed to do repairs, or if it had done repairs badly, or if the grating were damaged by regular wear and tear, or whether it had not been damaged at all.

[18] What was happening whilst her foot remained trapped? That evidence is also imprecise. Ms. Brown does not describe the positioning of her foot and why it was that she could not move it. The rushing water and floating debris may well have prevented her from seeing exactly what was happening for some time. However, she did say that it was when a passerby had expressed the opinion that the grate would have to be cut, that she herself grabbed her foot and pulled it out. I infer from this that at least at this stage the positioning of her foot was visible. There was no evidence about this important detail. Was it in fact a broken grating, a shifted grating, a manhole or combinations of these that caused Ms. Brown to be unable to move her foot?

[19] There was no evidence from Ms. Brown or anyone on her behalf as to the state of the grating shortly after the incident. The earliest reference to its condition after May 28, 2007 is in the records of the NWA which state that one week after the incident it was in good repair. Ms. Brown's only evidence of its condition after the incident is that she was present in September 2008, over a year after the incident, when the NWA representative took photographs of it.

[20] A photograph is in evidence on the application of the NWA, but I did not find it useful. There was no evidence that the grating photographed was in the same condition as at the time of the incident, but in any event, the photograph was decidedly unclear with almost half of the grating being covered by the shadow of a car which was parked nearby when the photograph was being taken and the remaining portion of the photograph lacking in clarity.

[21] In summary, there was insufficient evidence on behalf of Ms. Brown as to the details of the circumstances of the incident.

The Particulars of Negligence filed on behalf of Ms. Brown claim that on the part of the NWA the negligence was:

- 1) failure to properly secure the sewer grating over the said manhole so as to prevent the sewer grating from slipping out of position;
- 2) placing a defective sewer grating over the said manhole;
- 3) failing to maintain or properly maintain and/or replace the sewer grating which broke;
- 4) constructing the sewer grating in a dangerous manner along and over the said roadway.

[22] There is in my view no evidence presented to support any of the particulars of negligence claimed.

Particular 1 - *Failure to properly secure the sewer grating over the said manhole so as to prevent the sewer grating from slipping out of position.*

Ms. Brown gave no evidence of any failure by the NWA to properly secure the grating over a manhole. She made no reference to any slipping of the grating out of position or to any improper securing. She instead spoke of a break in the grating.

Particular 2 - *Placing a defective sewer grating over the said manhole.*

Ms. Brown gave no evidence that the NWA placed a grating that was defective over a manhole. There is indeed evidence of a broken grating but no evidence as to whether it broke during the incident or had been placed over a manhole in its broken state before the incident or even that it was observed to have been broken immediately prior to Ms. Brown's foot becoming trapped.

Particular 3 - *Failing to maintain or properly maintain and/or replace the sewer grating which broke.*

Here again there is an insufficiency of evidence to support this particular of negligence.

There is no direct evidence of improper maintenance or evidence from which improper maintenance could properly be inferred. Such an inference might have been drawn from evidence of what is regarded in the industry as acceptable standards of maintenance of such a grating and evidence that the NWA did not reach that standard. No such evidence was presented.

In the absence of evidence as to when the grating actually broke, if it did in fact break, it is not possible to find that there was negligence in not replacing the broken grating. It is possible that the break occurred at the same instant when Ms. Brown placed her foot on it, so that it would not have been possible for NWA to replace it before her injury.

Particular 4 - *Constructing the sewer grating in a dangerous manner along and over the said roadway.*

Here again no evidence was presented to support this particular of negligence which was claimed. There was no evidence that the construction of this grating differed in any way from construction of any other grating or that industry standards or even common sense showed that it had been dangerously constructed. Indeed, the unchallenged evidence of the NWA was that the grating was made of heavy cast iron and was constructed in a firm casing and it was very difficult to move.

- [23] On the other hand, the NWA's evidence was that there was nothing wrong with the grating either before or after the incident. They rely on their records of inspection to support that assertion. Their evidence describes the inspection of gratings in general, and of the relevant grating in particular, as being a process of driving past the grating and observing the state of repair from the moving motor car. The inspector does not do manual inspection unless there is an obvious problem or there has been a complaint. In my view such a casual inspection falls far short of what the public would expect to be carried out by the authority having responsibility for the state of the roadway.

[24] Was it that the NWA failed to do something it ought to have done? If so, this would be non-feasance and the common law exempts the NWA from liability to an injured party in such a circumstance.

Was it that the NWA did some repair and did so negligently? If that were so, this would be mis-feasance and the NWA could be liable. However, there is absolutely no evidence of this.

[25] The absence of detail as to what actually caused the incident means that I cannot determine, even on a balance of probabilities, if there is liability on the part of the NWA to Ms. Brown.

[26] It may be considered that the facts speak for themselves- *res ipsa loquitur*- and that if Ms. Brown was injured whilst using the roadway then that must mean that the NWA must be held responsible because it must have done something wrong that resulted in the injury. However, the law is that the principle of *res ipsa loquitur* must be specifically pleaded by the person relying on it. It was not pleaded and indeed Counsel for Ms. Brown submitted that he was not relying on the principle. No doubt, he adopted that approach because in order to assert that the facts speak for themselves two criteria must be met:

- (1) the thing which caused the accident must be shown to be under the management of the defendant or his servant or agent and
- (2) the accident must be such as in the ordinary course of things does not happen if those who have the management, exercise proper care.⁸

[27] In the absence of proof of the cause of the incident the two criteria, would not be met and the principle of *res ipsa loquitur* would have also failed.

[28] I conclude therefore that Ms. Brown has not provided sufficient evidence as to the cause of the incident. It is only if there is such evidence that I can determine

⁸ *Scott v. London and St. Katherine Docks Co* (1865) 3 H & C. 596

if the NWA failed to do something it ought to have done or if it did something negligently. Ms. Brown's claim must therefore fail.

[29] As it concerns costs, I am aware that costs are normally awarded to the successful party. However, in this case, the evidence is that Ms. Brown is a fruit vendor with severe family challenges. Indeed at the time of the incident, she was returning from Court where she had gone concerning the son of her recently deceased daughter. She obviously lacks wherewithal and a support system evidenced *inter alia*, by the fact that, according to her, she limped alone in what she described was "the long painful walk in the rain to the hospital" in her injured state.

Further, she does not appear to be the most alert witness. She waited for an extended period before reporting the incident. She denies that it was in fact one and a half years that had passed before she made the report but is unable to say exactly when it was. It is, however, unchallenged that it was not until September 2008 that she went to the grating with the NWA's inspector when the incident had been in May 2007.

Also, she appeared to be confused as to whether the incident was in 2007 or 2009 and some of her estimates, for example, time taken to walk from King Street to her home in Rosemary Lane, did not accord with common sense.

It also was not in keeping with good sense to place one's foot in rushing water full of debris, including glass, so dirty that the surface of the road was not visible.

In the circumstances of this case, where I accept that Ms. Brown was injured whilst using the public roadway of King Street and where I find that she will have to bear any costs arising from her injury in the future, and where she appears to suffer several challenges, I have determined that Ms. Brown should not be made to pay the costs of the NWA.

[30] **The order therefore is judgment for the defendant, the Attorney General. No order to as to costs.**

[31] Although in this matter Ms. Brown's case suffered because of insufficient evidence to prove her claim, it nonetheless shows the risks faced by users of the road. Because of the law in Jamaica, a person may be injured as a result of the condition of the road and still not be compensated by the road authorities for the damage suffered. The law is that the road authority is not to be held liable for failing to do what it ought to have done, that is, non-feasance. There has been no legislation passed to change that law so as to hold the road authorities responsible for failure to do what they ought to have done and indeed to extend liability for injury to road users in other areas.

[32] Society now demands more transparency and accountability from all Government authorities, not only road authorities, whose role is ultimately to serve and protect the citizens. Indeed some fifty years ago the laws in England were changed to require more accountability of authorities. It may well be thought that further delay by the Jamaican lawmakers in changing the law will result in victory for injustice.

[33] Vigilante justice has been rearing its ugly head across the Island and in my view it can primarily be defeated by each citizen's firm, unrelenting expectation of being subject to laws created to yield just results, and of course, the actual application of such laws which would result in the delivery of such justice.

[34] I now join the several voices which for years have called for lawmakers to consider the state of the law concerning non-feasance and mis-feasance and to determine if the law it should be modernised to reflect society's needs and better serve the citizens whose resounding cry is for justice.