SHERIFFDOM OF LOTHIAN & BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

Court Ref: PIC-PN1049-19

NOTE BY SHERIFF DOUGLAS KEIR

in causa

PATRICK QUINN

Pursuer

Against

SOUTH LANARKSHIRE COUNCIL

Defender

Pursuer: Crooks, Solicitor Advocate

Defender: Masters, Advocate

Note

[1] This is an action for personal injury as a result of an accident on 21 December 2016. The pursuer was employed by the defender as a waste services operative. He was engaged in his duties that morning, collecting and emptying refuse bins into a bin lorry on Derwent Water in East Kilbride when he tripped and fell, sustaining injury.

[2] A proof proceeded on 7, 8 and 9 February 2023. Parties had helpfully agreed damages in the sum of £43,861 inclusive of interest to 25 February 2020. The proof was restricted to issues of liability and contributory negligence.

[3] Seven witnesses gave evidence: the pursuer, Adam Bush, Angela Ferguson, Kevin McMahon, Martin Muir, Joe Barrow and John Pirie.

[4] The action is based on fault at common law. While it is not disputed that the pursuer fell at Derwent Water on the morning of 21 December 2016, the cause of his fall is disputed together with liability for that fall.

[5] As per parties' submissions, the legal framework is well established and the nature of the common law duty incumbent upon the defender is detailed by Lord Drummond Young in *MacDonald v Aberdeenshire Council* 2014 SC 114.

[6] The key issues for determination by this court were as follows:

(i) Did the pursuer fall as a result of tripping on the edge of a pothole situated on the footway adjacent to the property at No.1 Derwent Water?

(ii) If so, did the edge of the pothole constitute a hazard or danger that created a significant risk of an accident to a careful footway user such as the pursuer?

(iii) If so, whether a roads authority of ordinary competence would have identified that hazard and taken steps to repair it prior to the accident?

(iv) If each of these questions was answered in the affirmative then the issue of contributory negligence also fell to be considered.

[7] In relation to the factual circumstances surrounding the pursuer's accident, the evidence was in short compass.

[8] The pursuer was working as a waste services operative for the defender on the morning of 21 December 2016. He had started his shift at around 0730 hours. At some point between 0730 and 0800 he was collecting refuse bins and emptying them into a bin lorry on Derwent Water, a residential cul-de-sac in East Kilbride. He was working with his colleagues Adam Bush and Keith Laird. Mr Bush was also collecting/emptying bins while Mr Laird was driving the bin lorry.

[9] It was dark that morning, raining and windy. The pursuer was wearing his work boots. He had collected bins on Derwent Water on a monthly basis prior to the accident. He had already emptied two or three bins that morning and was walking towards the bin outside No.1 Derwent Water when he fell. He stated that his foot became caught in a pothole on

the footway and he fell. He had a clear memory of his foot catching the edge of the pothole nearest to the bin. He was not handling a bin at the time he fell. He had been looking where he was going but had not seen the pothole. He fell to the ground and was in immediate pain. One of his colleagues phoned for an ambulance and he was subsequently taken to Hairmyres Hospital. He confirmed that he would have told the attending paramedics and the hospital medical staff what had caused him to fall. He had also been interviewed by his managers Craig Douglas and Michael Whiteside a few weeks after his discharge from hospital. He had told both of them what had happened. He did not remember signing the defender's Accident Report (5/14 of process) but confirmed that his signature was on the document.

[10] During cross examination, certain entries in the medical records were put to the pursuer. He denied that he had been pulling a heavy bin at the time of his fall. He denied that he had been smoking cannabis on the morning of the accident. With regard to the Accident Report, he denied that his fall has been caused by catching his foot after a change in road surface. He also stated that while he was familiar with the accident locus, having attended there monthly since September 2015, he had not seen the pothole before.

[11] Adam Bush was working with the pursuer on the morning of the accident. He did not witness the pursuer's accident as he had been behind the bin lorry at the time. He had heard the pursuer scream and alerted Mr Laird. He ran over to where the pursuer was lying while Mr Laird phoned for an ambulance. He phoned his manager and then tended to the pursuer who was in significant pain. He could not remember if the pursuer had told him what caused him to fall. He had found the pursuer lying on the ground behind the car parked in the driveway at No.1 Derwent Water. The pursuer was positioned half on, half off the road. He confirmed that he had collected bins on Derwent Water on

previous occasions. He had worked on that particular route for around 6 months and they attended Derwent Water every fortnight. He had experienced difficulties with the surface of the footway outside No.1 Derwent Water during that time as it jerked the bins around.

[12] Angela Ferguson was a paralegal who worked for the pursuer's solicitor. She had spoken to the pursuer by telephone around August 2017. He had told her that he had tripped in a pothole and fallen. The pursuer had subsequently attended her office in October 2017 and handed her four photos that had been taken of the accident locus [Joint Bundle pages 4-7]. The pursuer had indicated with reference to Joint Bundle page 4 that he had fallen at the top edge of the damaged area on the footway visible in that photo. He had also indicated that his direction of travel had been from the bottom left hand corner of the photo towards the bin. She understood that involved moving from the road to the footway.

[13] She subsequently attended the locus in January 2018 when she had taken photos of the damaged area on the footway [Joint Bundle images 8-17] and various measurements. Using a metal ruler, the depth of the edge of the pothole where the pursuer had tripped was measured at around 25mm.

[14] Kevin McMahon was an independent consultant who had extensive experience in road safety matters including carriageways and footways. He spoke to the terms of his report dated 6 December 2019 [Joint Bundle page 283]. He carried out a locus inspection on 14 November 2019 but by that time the defect in question had been repaired. He was therefore not able to take any measurements and was entirely reliant on the photographs and measurements taken by others.

[15] He noted from Google map images that the surface of the footway at the accident locus could be seen to be degrading in May 2012. Having regard to the photographs taken at

the locus in January 2018, he considered that the surface layer of the footway had degraded over time, exposing the base layer. In his experience, the depth of such a surface layer would be between 30mm and 40mm. He had reproduced one of the images taken by Ms Ferguson and marked a red line on it to designate the one inch measurement [Joint Bundle page 301]. He considered that the image showed the depth of the defect to be in the region of 25mm at that time.

[16] He referred to the various published Codes of Practice ("COPs") which set out guidance for Roads Authorities in relation to the inspection, maintenance and repair of roads and footways. In terms of the hierarchy detailed in the COPs, he considered that the footway at the locus would fall into category 4, namely a local access footway. He agreed that the COPs were only guidance and that there was no recommended intervention levels for defects on roadways or footways. However he highlighted the three exemplars detailed in the 2005 COP where the intervention levels were stated to be lower than 25mm.

[17] He agreed that an annual inspection was an appropriate frequency for the footway in question. He had reviewed the defender's inspection records for the locus. There had been regular inspections carried out between May 2012 and May 2016. Other than pothole repairs carried out in May 2013, no other defects had been identified and no other repairs carried out. Following an inspection on 22 May 2018, a defect had been identified as a pothole greater than 25mm and reported for repair. This was the defect where the pursuer had fallen. He considered that the degradation would have progressed year on year from 2012 and would have been obvious at the 6-monthly inspections. On the basis that the surface layer of asphalt would have been 30mm and that had been eroded, the depth of the pothole could be at that level. It was probable that the edge of the pothole could have

been present at a depth of 25mm or more. Had the defender's road inspectors recognised the risk of further degradation, then a repair could have been ordered.

[18] During cross examination, Mr McMahon accepted that he had no specialist qualifications in comparing photographs. He had not marked a red line of the image taken on behalf of the defender [Joint Bundle page 302] as it had been taken at ground level and there was a better contrast of the defect as compared to the image taken by Ms Ferguson [Joint Bundle page 301]. He agreed that there was no photographic evidence of what the pothole looked like in May 2016. When it was put to him that the surface layer of the footway had a depth of 20mm rather than 30mm, Mr McMahon stated that there could be other degradation of the base layer which could lead to differing depths.

[19] Martin Muir was employed by the defender as a Roads Manager. He spoke to the defender's Procedure for Road Inspections and Defect Categorisation [Joint Bundle page 341]. The footway in Derwent Water was a category 4 footway and was inspected annually. When footway safety inspections were carried out, inspectors were generally looking for defects greater than 25mm. It was a matter for the judgment of the individual inspector to determine what category to assign any particular defect identified. There were four categories of defect, category 1 representing the highest risk and requiring immediate action, to category 4 where the defect would be monitored and reviewed at the next inspection. Having reviewed image taken showing the footway defect on 16 December 2016 [Joint Bundle page 4], he considered that this would either be a Category 3 or Category 4 defect.

[20] He added that the properties at Derwent Water were built in the 1980s. At that time, the standard specification for footways was a 40mm base layer and a 20mm surface layer.

[21] Under cross-examination, Mr Muir confirmed that a defect of less than 25mm could be classified as a Category 3 defect but classification was down to the inspector's judgment. He accepted that there had been a defect on the footway of some sort at the locus since May 2012, that it had not been repaired until May 2018 and had been allowed to deteriorate in the meantime.

[22] Joe Barrow worked as an Assistant Engineering Officer for the defender. He carried out road inspections at Derwent Water until 2016. His inspections were carried out as he was driven around by a colleague in a specialised van. He had carried out inspections at the locus between May 2012 and May 2016 as per the inspection reports produced [Joint Bundle 311-312]. Other than a repair to a pothole on the carriageway in November 2013, he had not recorded any defects. His last inspection at the locus had taken place on 17 May 2016. He did not recall that inspection but according to the reports, he had not recorded any defects. He was shown the image of the defect taken on 16 December 2016 [Joint Bundle page 4]. He stated that if he had seen that in May 2016, he would not have classified it as a defect but would have monitored it on his next inspection.

[23] John Pirie was the final witness to give evidence. He was also employed by the defender as an assistant engineering officer. He had taken over inspecting Derwent Water from Mr Barrow at some point in 2016/2017. He confirmed that the inspections would be carried out by van with the inspector sitting in the passenger seat. The van would be driven at around 10 to 15 mph. It was a matter for the inspector's informed judgment as to whether or not a defect should be categorised as a hazard. He attended the locus on 30 April 2018, having been requested to do so by Martin Muir. He had taken photographs of the defect [Joint Bundle pages 317-318]. He had measured the depth of the defect at its deepest point to be around 13mm. He had subsequently carried out the annual safety

inspection on 22 May 2018. Following that inspection, he had put through a report for the defect to be repaired. He classified the defect as Category 3, i.e. not a safety defect but due to projected wear and tear, a repair was appropriate. Contrary to the content of the inspection report [Joint Bundle page 313], the defect was not measured as being greater than 25mm. The electronic form completed had fixed wording in a series of drop-down boxes. He had not taken any measurements during his inspection on 22 May 2018. He was not aware of any previous reports of defects at the locus or of any complaints from the public.

[24] In terms of my assessment of the evidence, there were a number of elements of the pursuer's evidence that did not fit with other evidence presented to the court. The pursuer told the court that he had been walking on the footway prior to putting his foot into the pothole. His foot had then caught on the edge of the hole. According to Ms Ferguson, the pursuer had indicated to her that he had been walking from the road to the footway. Separately, according to the Accident Report completed on 10 January 2017 [5/14 of process], the accident description signed by the pursuer stated "he possibly caught foot *after a change in road surface*" (emphasis added). The content of the Accident Report is consistent with Ms Ferguson's account of the pursuer's movements, namely walking from the road onto the footway when the fall occurred. Moreover, in terms of the medical records available, I would highlight the following entries:

(i) Scottish Ambulance Service Report [Joint Bundle pages 260-262] completed by the attending paramedics - "was walking and tripped into a pothole in the ground causing him to fall";

(ii) Hairmyres Hospital Multidisciplinary Admission Record [Joint Bundle page 268] – "works as bin man – pulling a heavy bin – foot fell into a pothole… also smoking cannabis this morning"

[25] The pursuer submitted that these entries were consistent with his account in court. I disagree. I consider that they are more consistent with the pursuer falling as he moved into the pothole rather than, as the pursuer maintained, tripping on the top edge of the pothole. There is also the reference to the pursuer pulling a heavy bin and smoking cannabis that morning. The pursuer denied the accuracy of those entries but it is difficult to envisage the attending medical professional recording such erroneous information when compiling the important patient history for the pursuer.

[26] All of these issues affect the pursuer's credibility and reliability and when taken together, I have arrived at the view that I am unable to rely on the pursuer's evidence except where it coincides with witness evidence that I have found to be credible and reliable.

[27] While I consider that Mr Bush was a credible and reliable witness, he added little to the factual matrix. He did not see the pursuer fall and did not know what caused the fall. While he referred to previous issues with the footway at the accident locus, I understood those to relate to his ability to move the bin cleanly across the footway as opposed to any issues with safety.

[28] I consider that all of the other witnesses, both for the pursuer and defender, gave their evidence in a straightforward manner and consider that they were doing their best to assist the court. I accept their evidence as generally credible and reliable insofar as it is relevant to my decision.

[29] Focusing on liability, the first issue is whether or not the pursuer fell as a result of tripping on the edge of a pothole situated on the footway at the locus. On the basis that I have not accepted his evidence except where it coincides with witness evidence that I have found to be credible and reliable, I conclude that the pursuer has failed to establish his account of the accident on the balance of probabilities. As such, he has failed to prove fault on the part of the defender and they are entitled to decree of absolvitor.

[30] If I am wrong about that, the second issue for determination is whether or not the edge of the footway defect constituted a hazard or danger that created a significant risk of an accident to a careful footway user such as the pursuer. In this regard, it is worth highlighting that both the pursuer and Mr Bush regularly collected and emptied bins at the locus (monthly according to the former and fortnightly according to the latter). On any view, both had been present at the locus on numerous occasions over a period of several months yet neither had either noticed the defect on the footway or felt it necessary to report it to anyone. This was consistent with the evidence led on behalf of the defender that they were not aware of any previous incidents at the locus and had not received any complaints about the state of the footway. More fundamentally, I have accepted the evidence of the defender's employees as credible and reliable. In that regard, I accept that the defender carried out regular inspections of the locus at an appropriate frequency (a point supported by Mr McMahon) and at the time of the last inspection prior to the pursuer's accident, namely the inspection in May 2016, there was no safety defect present.

[31] Whatever the position was when site inspections were carried out in January 2018 and April 2018 (>12 months after the accident and >20 months after the May 2016 inspection), and whatever measurements were obtained on those occasions, that becomes academic as the pursuer has failed to prove on the balance of probabilities that there was a footway

defect that constituted a hazard or danger that created a significant risk of an accident to a careful footway user at the time of the May 2016 inspection. The general consensus of the witness evidence was that the defect on the footway would not improve over time. As such, the only inference that I draw from the evidence available is that the depth of the defect in January 2018 was likely to have been greater than it was in May 2016. In the absence of any other positive evidence about the defect in May 2016, it therefore follows that the pursuer has failed to prove that the footway defect present in May 2016 constituted a danger that created a significant risk of an accident. On that basis, the first part of the test laid down in *MacDonald* has not been met. As such, he has failed to prove fault on the part of the defender and they are entitled to decree of absolvitor.

[32] Turning to the pursuer's *esto* case, namely that the defender had a duty to identify and repair the defect on the footway even if the depth was less than 20mm. In all the circumstances of this particular case, I do not consider that a failure to identify and repair a footway defect of a depth, on the defender's evidence, of around 13mm equates to a failure to exercise reasonable care. The pursuer has not established that such a defect would create a significant risk of accident to a careful footway user. Moreover, there was an absence of evidence as to what a roads authority of ordinary competence would have done to address such a defect. I do not consider the reference to the practice of West Lothian Council provided the court with any material assistance. In any event, it is well established that the failure of a roads authority to follow its own policy is not sufficient to establish a failure to exercise reasonable care, far less a failure to follow the policy of a separate Roads Authority in a different Local Authority area. The appropriate test is detailed in *MacDonald* and the pursuer's *esto* case has failed to meet that test. This court's view is that the defender was entitled to arrive at the decision that the state of the footway

at the locus did not require to be repaired following the regular inspections carried out prior to the pursuer's accident in December 2016.

[33] In conclusion, based on the evidence before the court, the pursuer has failed to prove on the balance of probabilities that the defender was in breach of their duty to exercise reasonable care for users of the footway and to maintain the footway in a safe condition.

Contributory Negligence

[34] *Esto* I am wrong on liability, it is necessary to address contributory negligence. It is well established that each case must be considered on its own facts and circumstances.

[35] In the circumstances of this case, the pursuer was familiar with the locus, having attended on at least a monthly basis for several months prior to the accident. He knew or ought to have known about the presence of the footway defect. His focus had been on collecting the bin. Had I found in favour of the pursuer, I consider that a deduction of 20% would have been appropriate.

Conclusion

[36] The pursuer has failed to establish liability on the part of the defender. Decree of absolvitor is therefore granted in favour of the defender.

Sheriff D Keir Digitally signed by Sheriff D Keir Date: 2023.02.21 14:55:09 Z

Sheriff D Keir

Sheriffdom of Lothian

& Borders at Edinburgh

10 February 2023