

ENGLAND AND WALES / JUDGMENT

Barker v Lancashire County Council

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Case No: B3/2012/2593 & B3/2012/2593(A) Neutral Citation Number: [2013] EWCA Civ 582 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM BURNLEY COUNTY COURT HIS HONOUR JUDGE BUTLER OY003263 Royal Courts of Justice Strand, London, WC2A 2LL Date: 23/05/2013 Before : THE RIGHT HONOURABLE LORD JUSTICE LONGMORE THE RIGHT HONOURABLE LORD JUSTICE MCFARLANE and THE RIGHT HONOURABLE SIR STANLEY BURNTON

- ----- Between : KEITH BARKER
- and - LANCASHIRE COUNTY COUNCIL Appellant Respondent
- ----- (Transcript of the Handed Down Judgment of WordWave International Limited A Merrill Communications Company 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400, Fax No: 020 7831 8838 Official Shorthand Writers to the Court)
- ----- Mr Ian Little (instructed by Pattinson & Brewer) for the Appellant
Mr David Knifton (instructed by County Secretary and Solicitor's Group) for the Respondent
Hearing dates: 9th May 2013
- -----

Judgment

Lord Justice Longmore: 1. The short point for which permission to appeal has been given in this tripping case is said to be whether, granted that a claimant for the purpose of establishing liability under s. 41 of the Highways Act 1980 has to identify the particular defect in the highway that gave rise to his injury, the local authority can also refer exclusively to that particular defect when seeking to establish their statutory defence under s. 58 of the 1980 Act. Mr Barker submits that, if the local authority were in breach of duty in relation to a wider part of the highway than that containing the particular defect and if they ought to have performed the duty to maintain in such a way as to have eradicated the individual defect which caused the injury, then they should be liable notwithstanding that there was no absence of due care in relation to the individual defect that caused the accident. 2. The short facts giving rise to the appeal are:- i) ii) iii) iv) v) vi) Mr Barker tripped and fell on a raised cobblestone in the surrounding area of a tree pit outside 48 Henderson Street, Preston, at approximately 5.30 p.m. on 29th October 2007 when it was getting dark. Photographs of the area near Mr Barker's house where the accident occurred show a semi-pedestrianised street furnished with flagstones and cobbled areas surrounding occasional cherry

trees; the particular cobblestone which caused Mr Barker to trip was protruding above the surface of the surrounding cobblestones by about an inch at the time of Mr Barker's accident; the protruding cobblestone presented a real source of danger to pedestrians and arose from the Council's failure to maintain the highway, such that a breach of the statutory duty under s 41 of the Highways Act 1980 was established; the Council had a system of annual inspections of highways such as Henderson Street; inspection once a year was reasonable; there had been no prior complaint regarding the cobblestones in Henderson Street; the inspectors who carried out the last annual inspection on 9 th August 2007 were experienced inspectors, who carried out their duties conscientiously and carefully, and who identified and recorded defects at other locations in Henderson Street. If the cobblestone had protruded more than 20 mm at the date of their inspection, they would have noticed it and eliminated the protrusion; that was because what the Council called their "intervention level" was 20 millimetres (0.79 inches) above the level of the street; and vii) during the period of 11 weeks between the last inspection on 9 th August and the accident on 29th October, tree root growth beneath the cobblestone had moved the cobblestone upwards by up to 1 cm (0.39inches); 3. His Honour Judge Butler, sitting in Preston, held that the Council had taken the necessary care envisaged by section 58 of the 1980 Act because the cobblestone was 4. not dangerous at the time of the inspection on 9th August and there was no reason to suppose that it might become dangerous in the next 12 months before the next inspection. The judge further held that, if he was entitled for the purpose of s. 58 of the 1980 Act to look beyond the individual cobblestone to the tree pit as a whole, the Council might not have discharged the burden of proof on them under that section because there were indications of untidiness and loose cobblestones which might have caused the Council to re-lay the whole area of the tree pit. If that had been done, it would have been done before 29th October by the removal of the cobbles including the one that caused the accident. So the judge said that, if he was able to consider the whole area of the tree pit, he would have found for Mr Barker. Mr Barker now appeals on the basis that the judge should have had regard to the state of the tree pit as a whole on 9 th August 2007 and concluded that the Council had not shown that they had taken the care which was reasonably required to secure that that part of the highway to which the action related was not dangerous for traffic. 5. Section 41(1) of the 1980 Act provides:- "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." Section 58 of the Act provides:- "(1) In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) 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 relates was not dangerous for traffic." The court is directed by sub-section (2) to have regard to a number of matters in considering the highway authority's defence but it is agreed that it is only (d) which is relevant for the present case:- "whether the highway authority knew, or could reasonably have been expected to know, that that condition of the part of the highway to which the action relates was likely to cause danger to users of the highway." 6. It is said that the question therefore arises whether in requiring the highway authority to have exercised such care as in all the circumstances was

reasonably required to secure that “the part of the highway to which the action relates” was not dangerous, it can be said that that “part of the highway” is wider than that part of the highway which caused the accident – in this case the cobblestone which caused Mr Barker’s injury. 7. 8. 9. It is clear both as a matter of principle and authority that a successful claimant in a tripping case must, in order to bring his claim within section 41 of the Act, prove that his injury resulted from a dangerous condition of the highway created by the highway authority’s failure to maintain or repair the highway. For this purpose it is accepted that he must identify the defect in the highway which gave rise to his injury and that it is not enough to show that the general area of the highway was in some way defective, see *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR P 291 and *James v Preseli Pembrokeshire District Council* [1993] PIQR P 114. Inevitably, therefore, the main focus of the section 58 defence must likewise be on the defect identified by the claimant; defects in nearby parts of the highway did not cause the accident and investigation into them will normally be an irrelevant inquiry. That point need not, however, be conclusively determined in this case because the facts, as found, cannot, in my view, give rise to any legitimate conclusion that the Council failed to prove that they had taken “such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.” That is because the judge went out of his way to say that he was satisfied that the Council surveyors who inspected the street on 9th August 2007 (Mr Thomas and Mr Grout) would have seen the protrusion of the cobblestone if it had then exceeded 20 mm. He said that Mr Thomas (whom he heard give oral evidence) was an impressive witness and added (page 17-18 of the agreed and approved note of his judgment):- “He was the sort of man who would perform his duties conscientiously and carefully. He had been doing the job since 2001, had worked with Mr Grout for 3 years, and was a training inspector. He told me that at tree stations you are told to be more diligent. There was a school opposite, so he would have looked carefully. Had he seen the defect he would have picked it up. I find that if the defect had been there, Mr Thomas would indeed have picked it up and seen it. I am in no position to judge Mr Grout in terms of his impressiveness or diligence as he did not give evidence before me. Although his statement was adduced under the Civil Evidence Act, hearsay evidence does not have the same weight. The only evidence I have regarding Mr Grout is that Mr Thomas said he was very diligent, and sometimes surprised him by picking up things Mr Thomas might not notice.” He later refers to the cobblestone not being at intervention level as being the reason why “these experienced inspectors would not have picked it up”.

10. We were told (although this was not recorded as such in the judgment) that it was likely that there were at least two other cobblestones that would have been protruding more than 20 mm on 9th August 2007. This was based on the evidence of an inspection by Mr Bumford of the Council in February 2008. Photographs then taken by him showed protrusions which might well have been present in August 2007 at any rate if, unlike the relevant protrusion, there had not been a growing nodule of a root underneath those cobblestones. Mr Bumford’s report of February 2008 does refer to “numerous trips” and “an untidy area” which the judge concluded did exist in August 2007 but all he says about it is this (page 20):- “But if I were looking for the potential to become dangerous, I find that the defendant might not have

discharged the burden of proof. The area was plainly untidy, some cobbles were loose and the state of the tree pit was something that might well have led the inspectors to decide that maybe there was nothing dangerous yet, but they should re-arrange and re-lay the area.” The double use of the word “might” shows how speculative the judge’s scenario is. The inspectors “might” have decided that, despite the absence of present danger, they should “re-lay” the area and so the Council “might not” have discharged the burden of proof. That note of doubt was highly pertinent because the judge had already held that the inspectors, Messrs Thomas and Grout, were diligent and experienced personnel who would see and repair any dangerous defects. He does not begin to explain how these diligent and experienced inspectors could have missed any potential danger stemming from the untidiness of the tree pit, any looseness of the cobblestones or any protrusion (of other cobblestones) at greater than the Council’s intervention level of 20 mm. In these circumstances there are just not the findings of fact which Mr Barker needs if he is to pursue a case that there were in August 2007 defects in the area of the tree pit (unconnected with the actual cobblestone over which he tripped) which the Council should have dealt with by re-laying the whole tree pit by October 2007 and that such re-laying would have eliminated the actual cobblestone which caused his injury. In an engaging but doomed submission Mr Little on behalf of Mr Barker, relied on the judge’s last sentence in which he said that if he were “able to look more widely at the general area”, he would have found for Mr Barker and said that the judge must have intended to make (and his judgment must therefore be read as containing) the findings that Mr Barker needed. But those findings are just not there and cannot be simply conjured up. It would be unfair to Mr Thomas and Mr Grout to do so in the light of the judge’s earlier assessment of their diligence and experience. The point of law which Mr Little wished to raise must, therefore, await final decision on another occasion. I would just say that the wording of s. 58 of the 1980 Act uses the phrase “the part of the highway to which the action relates”. That phrase is to my mind more apt to describe the actual feature that caused injury to a claimant rather than a wider or more generalised area of the highway which did not cause any injury in the case before the court. It is, moreover, appropriate to recall the judgment of Steyn LJ as he then was in *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR P 291 in relation to an “unremarkable” street scene in Barnsley in which he said (page 295):- “It is important that our tort law should not impose unreasonably high standards, otherwise scarce resources would be diverted from situations where maintenance and repair of the highways is more urgently needed.” 11. 12. 13. As in Barnsley, so in Preston. 14. I would, therefore, dismiss this appeal. Lord Justice McFarlane: 15. I agree. Sir Stanley Burnton: 16. I also agree.

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