OUTER HOUSE, COURT OF SESSION

[2009] CSOH 148

OPINION OF LADY STACEY

in the cause

MRS LYNN McGOVERN

Pursuer;

PD1947/08

against

GLASGOW CITY COUNCIL

Defender:

Pursuer: O'Rourke; Brodies LLP

Defender: McConnell; Council Solicitor; City of Edinburgh Council, for Glasgow City Council.

6 November 2009

[1] On 8 January 2007 Mrs Lynn McGovern parked her car in Great Western Road, Glasgow in order to go to a shop. When she had completed her errand, she intended to cross the road and return to her car. It was 4.45 pm and dark. It was raining very heavily. Mrs McGovern stepped off the pavement into a pothole in the road and fell forward onto her knees, putting her hands out to save her from falling on her face. She sustained injury to her leg.

[2] Parties were agreed that Mrs McGovern had fallen and prior to the proof had agreed quantum of the claim at £5,000. They had resolved any question of contributory negligence which might arise and so the proof proceeded on the basis that if the pursuer succeeded then decree for £5,000 should be pronounced; if she did not then decree of absolvitor would follow.

[3] The case against the defenders was brought on the basis of their having a duty to take reasonable care to maintain Great Western Road, Glasgow in a safe condition for persons such as the pursuer who required to cross it on foot. When making closing submissions, counsel told me that they were agreed on the question of negligence. For the purposes of the proof, the defenders accepted that they should be held to have failed in their duty if it were proved that the pothole in which Mrs McGovern fell existed at a depth of at least 40mm on 27 November 2006, which was the date on which it was accepted that an inspection of the road had taken place. There was therefore no need for submissions on whether or not the defenders had been negligent as it was accepted for the purposes of this proof that the only question the court required to determine was whether or not the pothole existed at a depth of at least 40mm on that date.

[4] The pursuer's evidence was that she did not see the pothole because it was full of water and the road had surface water on it. After falling she was helped to her feet and then returned to her car where her children were waiting for her. She attended to family commitments and then returned to look at the pothole. She took a photograph. Next day she returned to the pothole and took further photographs and measurements with the aid of her children. She measured the length of the pothole, parallel to the pavement, at 48 inches. She measured the depth by crouching down on the road and putting one hand down in the deepest part of the pothole and holding a measuring tape straight up to the level of the road. The measurement she thereby

obtained was 6 1/2 inches. Mrs McGovern explained that she frequently made curtains and so was used to taking accurate measurements with her measuring tape. It was suggested to her by counsel for the defenders that her method of measurement was unscientific and therefore inaccurate. She disagreed. She accepted that there was no scale in the photographs and that the photographs themselves did not show the depth or indeed the length of the pothole clearly. She was however adamant that her measurements had been reasonably accurate. Counsel suggested to her that she had exaggerated the medical consequences of the accident, as I understood it to enable him to submit that if she had done so then she may have exaggerated the measurements of the pothole.

[5] The pursuer led Mr Stewart Paton as an expert witness. He explained that he was the principal of a company, Stewart Paton Associates Limited and from the report (6/6 of process) written by him and lodged by the pursuer it could be seen that he was qualified as a civil engineer. Mr Paton had been working as a civil engineer since he graduated in 1973 and had considerable experience of major projects undertaken either as an engineer, an engineer's representative or a project manager. He had run his own company since 1999 and in that undertook road safety audit work, advisory work for various organisations and the provision of expert reports both for contractual disputes and for road traffic offence prosecutions and road traffic accident investigations. He had not examined the pothole in this case and his opinions were based on the information given him by the pursuer's solicitors which was that the pothole was 6 1/2 inches deep and 48 inches in length. He did see the photographs taken by the pursuer and took the view that he was unable to gauge the depth from them other than to note that the upper layer of asphalt which is generally 40 mm thick, had worn away. Mr Paton said that a kerb stone is a standard length of three feet, and that Mrs McGovern's measurement of the length of the pothole seemed to be reasonably accurate as he could see from the photograph that it extended to roughly 1⅓ of a kerb stone. He was able to note from the principal of the photographs (as opposed to copies provided for the court) some cracks in the carriageway appearing between the edge of the pothole and the car wheel in position while the photograph was being taken, and also some peripheral cracks going in a rough ring shape around the pothole. Mr Paton stated that in his opinion the pothole was very likely to have been there at a depth of at least 40 mm prior to 27 November 2006. He thought it unlikely in the extreme that the pothole could have developed to the size measured by the pursuer in a space of less than about 2 or 3 months and thought that there must have been at least a part of the pothole present for longer than that. While he could not describe development of the pothole over the months, he did not think it likely that it had developed from less than 40 mm to 165 mm between 27 November and 8 January. He explained that potholes can arise in a variety of ways. These include a collapse from below; cracking of the surface because it is not laid properly in the first place; wearing away of the surface due to age; cracking of the surface due to the weight of traffic; and a dissolving of the surface due to the effect of diesel being spilt on the surface. Once cracks are present they can be made worse by the effect of weather especially if water enters the cracks and then freezes. Mr Paton noted that the extent of the defect shown in the photograph must have penetrated more than one layer of asphalt. He said that that was a long term process and was affected by a number of factors including oxidation and the loss of volatile oils. These processes lead to the material becoming brittle with age and thereby failing to bind and wearing away. Thus Mr Paton was of the opinion that due to the measurements of the pothole, and the wearing away of the top layer, and the cracking near to it and around it, the pothole was likely to have been in existence and at least 40 mm deep on 27 November 2006.

[6] The defenders led evidence from Mr John Dougan, safety inspector, Glasgow City Council. He explained that he had worked for Glasgow Corporation, Strathclyde Regional Council and Glasgow City Council for a total of 30 years split into two 15 year stretches. They were the authorities who had responsibility for the roads in Glasgow. He was a skilled road worker. He had Scotvec qualifications in road works. Since 2004 he had been employed by Glasgow City Council as a safety inspector. In his job as a safety inspector Mr Dougan examined the carriage way at Great Western Road twelve times per year. He did this by means of a "moving inspection" where he was driven in a van at a speed between 15 to 20mph. He observed from the van by looking ahead and to the side and made notes in a notebook of any defects which were reportable. A pothole of 40 mm or more would be reportable. Mr Dougan said that he did not as a rule get out of the van and go and inspect defects but that he would do so if he felt that it was necessary because he could not get a

good view. Mr Dougan said that he remembered an inspection which he carried out on 27 November 2006 at the *locus* where Mrs McGovern fell. He was sure that there was no reportable defect on that date. He also remembered inspecting the area on 12 January 2007 when he saw that there were two potholes which had joined together and that the "wearing course", that is the top layer, was worn away. He said that he could see marks on the lower surface which are caused when the surface is planed before being renewed. He did not measure the pothole because he could tell from looking at it that it was about 70 mm or a little more. Therefore it was above the reportable size. There had been no need on either of the inspections to get out of the car as he could see clearly both times. He was certain there had been no pothole on 27 November 2006. He was equally certain that on 12 January there was a pothole of a depth around 70 mm. Therefore he was of the opinion that the pothole had developed between those dates.

[7] The defenders led Mrs Christine Francis a senior employee of the defenders. Mrs Francis had qualified as a civil engineer and had worked as a civil engineer in connection with roads since graduating in 1979. She had held various posts in Strathclyde Regional Council and Glasgow City Council. Her current post involved her in having responsibility for roads maintenance throughout Glasgow. Although Mrs Francis was a senior employee of the defenders and acknowledged that she had an interest in the outcome of the case, she said that she understood she was being asked for an expert opinion and that she must not favour her employer. She had read Mr Paton's report.

[8] There was no report from Mrs Francis. She gave evidence to the effect that the most common cause of potholes is weakness in the road surface, caused by a variety of problems including collapse below, the bitumen being cooled when laid, the bitumen becoming old, oxidised and brittle, there being heavy traffic and, at bus stops, spillage of diesel. When she was shown the photographs lodged on behalf of the pursuer Mrs Francis at first said that there were of very poor quality for the purpose of assessing the depth of the pothole. She then said that she would however guess that the depth being 3 inches. Mrs Francis said she thought it very likely that such a pothole could develop from less than 40 mm in depth on 27 November 2006 to 165 mm in depth on 8 January 2007. (Parties had agreed by means of a joint minute that 6 1/2 inches is equivalent to 165 mm.) She was aware that Mr Paton thought that was unlikely and she disagreed with him. Mrs Francis described it as a single pothole, most likely to have developed due to diesel leak and constant bus traffic. She said that it would have been quite likely to have developed in a very short space of time and likely to have developed between the inspection on 27 November 2006 and the accident on 8 January. She thought that it could have developed overnight. Mrs Francis had not seen the principal photograph before giving evidence. She was not asked about the cracking which Mr Paton said he could see. She did say that she did not think that the cause was simple ageing; she believed the most likely cause was diesel spill.

[9] I therefore had to determine from the evidence what the state of the road was on 27 November 2006. It was not in dispute that Mrs McGovern had fallen in a pothole which on 12 January 2007 at least 70 mm deep. It was however disputed that she had measured it accurately on 10 January at 165mm. There was a dispute about Mr Dougan's evidence, in that he stated that he had seen no defect on 27 November, whereas the expert evidence for the pursuer was to the effect that it was very likely that there was a defect. The two expert witnesses gave differing opinions about the likely development of the pothole.

[10] Counsel for the pursuer submitted that I should accept the evidence of Mrs McGovern as accurate. He pointed out that she had measured the depth of the hole and that she had experience of taking accurate measurements for her work in making curtains. He said that her measurement of 48 inches had been commented on by Mr Paton as reasonably accurate because he could tell that each kerbstone was 3 feet in length and the area on the photograph showed that the pothole's length was approximately 1⅓ kerbstone length. He submitted that Mr Paton gave evidence in a measured fashion and that his opinion was that it was unlikely that a pothole of the size described by the pursuer would appear in the short period of time between the inspection on 27 November 2006 and the accident on 8 January 2007. He was able to explain that he came to that opinion because of the dimensions of the pothole; the appearance of the top layer being worn away, and the cracking nearby.

[11] Counsel for the defenders on the other hand moved me to grant decree of absolvitor. He criticised the pursuer's evidence as exaggerated. He said that her method of measurement was unscientific and therefore inaccurate. He accepted however that there was no other measurement given in the case and that the pursuer had explained how she had carried out the exercise of measurement. He submitted that I should rely on Mr Dougan as an experienced and honest witness who had not seen any pothole in November and therefore should hold that there was good evidence that there was no such pothole. He submitted that Mrs Francis had better practical experience than Mr Paton, being involved in working with the Council on maintaining the road and that I should prefer her opinion concerning the way in which the pothole had come into being.

[12] Counsel referred me to the case of *Davie* v *The Magistrates of Edinburgh* 19523 S.C. 34 for the correct way in which to assess expert evidence. There was no dispute between counsel about Lord President Cooper's well known dictum to the effect that expert witnesses could only give evidence but could not usurp the function of the judge or jury. I was also referred to the case of *Nugent* v *Glasgow City Council* [2009] CSOH 88 in which both Mr Paton and Mrs Francis had given evidence. Counsel for the defenders referred to Lord Brodie's opinion at paragraph 2 in which he found that while Mrs Francis was an employee of the defenders he did not take her to be any less objective than in her evidence than Mr Paton. His lordship noted that counsel did not encourage him to assess the relative degree of independence of the professional witnesses. Counsel referred to the case of *Hutchison* v *North Lanarkshire Council* [2007] CSOH 23 in which Lord Brodie gave his opinion on the law relating to liability on road authorities. I did not understand why that was referred to given that parties had agreed that the only question on which they sought the court's decision was a factual one. I was also referred to two cases said to be similar to this one in that they related to accidents on uneven roads. I did not find those cases helpful.

[13] Having weighed up all of the evidence I am satisfied that the pursuer has proved her case. I accepted her as a credible and reliable witness. She was the only person who had measured the pothole and I took the view that her description of the way in which she had done so was clear and likely to have resulted in a reasonably accurate measurement. I accepted that the length of the pothole was reasonably accurately measured at 48 inches as shown by Mr Paton's evidence about the length of a kerbstone. Thus I accepted that Mr Paton's opinion, based as it was on the pursuer's measurements, was accurately based. I found his reasoning persuasive as he described the methods by which potholes were created and in light of the wearing away of the top surface, and the cracks around this pothole, I was persuaded that he was correct in thinking it had been present to a depth of at least 40 mm on 27 November 2006.

[14] While I accepted Mr Dougan as an honest witness I was not persuaded that I should accept his evidence that there was no pothole on 27 November 2006 given the pursuer's clear evidence that there was a pothole of the size I have found in January and Mr Paton's evidence that such a pothole was not likely to be created in the period of time involved. He agreed in cross examination that he may have missed it though he did not believe he had.

[15] I also accepted Mrs Francis as an honest witness, but I noted that she was prepared to hazard a guess at the depth of the pothole despite having no basis for doing so. While she was not asked very clearly to comment on this, it seemed that her opinions were based on the pothole being smaller on the date of the accident than claimed by the pursuer. I did not accept that to be so. I took the view that she laid too much emphasis on the diesel spillage as a likely explanation for the pothole without explaining why that was more likely than various other possibilities. She had not looked at the principal photograph before giving evidence and was not asked to comment on the cracking. I found it unhelpful that there was no warning in the pleadings of Mrs Francis' theory that the pothole was caused by diesel spill, nor any report from her. I had some concerns that Mrs Francis position as a senior employee of the defenders, and as a fellow employee of Mr Dougan, may have made it difficult for her to be entirely objective.

[16] I accept the evidence of the pursuer. I prefer the evidence of Mr Paton to that of Mrs Francis, and I find that the pothole was in existence to the extent of at least 40 mm on 27 November 2006. I accept that Mr

Dougan was honest in saying he did not see it on that date, but I find that on the balance of probabilities it was there.

[17] I therefore grant decree for payment by the defenders to the pursuer of the sum of £5,000 with interest 8% per annum from 28 days after the date of decree until payment.

[18] I was not addressed on expenses and will put the case out for a hearing. I indicated to counsel that I will require to be addressed on the appropriate scale.