Neutral Citation No [2009] NIQB 56 | *Ref:* **GIL7482**

Judgment: approved by the Court for handing down | *Delivered:* **17/06/09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

AMANDA PROCTOR

Plaintiff;

-and-

GEORGE YOUNG

First named defendant;

-and-

COLERAINE BOROUGH COUNCIL

Second named defendant;

-and-

DOUGLAS McCLARTY T/A McCLARTY AND COMPANY

Third party.

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GILLEN J

Cause of Action

[1] On 30 August 2000 at 9.30 am approximately the plaintiff, whilst exercising a race horse known as Ringend Rose owned by the first defendant, on Whiterocks Beach, Portrush ("the location") which was leased by the second named defendant from the government, was injured as a result of a fall from the horse sustaining catastrophic personal injuries.

[2] This action was concerned only with the issue of liability, the question of quantum being left to a further hearing in the event of the plaintiff succeeding against either of the defendants.

[3] During the course of the trial, the first named defendant submitted to judgment being entered against him. He also agreed to judgment being entered for the third party (an insurance broker) against him.

[4] Accordingly the issue in this trial was the liability or otherwise of Coleraine Borough Council ("CBC") to the plaintiff in negligence and breach of statutory duty.

Background facts

[5] At the time of the accident the plaintiff, aged almost 28 years of age, had some experience in horse riding. She had attended a youth training scheme in Doncaster for about two years in 1992 and had worked in Donegal preparing horses for sales which involved basic riding until about 1993. Having obtained some academic qualifications and married with two children, in January 2000 she began working for the first named defendant as a horse trainer following an advert in the Coleraine Chronicle for someone to exercise point to point horses.

[6] These were race horses to be trained on the flat. She was interviewed by the first defendant and, after two practical tests riding horses on Whiterock Beach, was offered the position to exercise his horses. I am satisfied that there was remuneration and that she was an employee of the first defendant earning approximately £20 per week initially which was later increased to £40 per week as she was also learning to jump horses on his land in Stranocum. I was satisfied therefore that the plaintiff was someone with experience of horse riding and who was in employment to exercise race horses.

[7] Along with a Margaret Elliott, Marshall Carson and a young boy called Adrian, she took part in exercising horses at the accident location on various occasions. They also had gone to the nearby Benone Beach but this was too flat for what the first defendant wanted. The beach at Benone was different to Whiterock and he found that the horses galloped too fast. The soft sand at Whiterock was preferable because it built up stamina in them.

[8] The plaintiff therefore had been working between January and August when the accident occurred. Her evidence was that she had noticed holes and depressions from time to time on the beach. Sometimes she would be aware that holes might be deeper and she would swerve around them. However she was not anxious to waver too much on the horse lest Young would think that she had lost concentration. In a conversation with him about two weeks before the accident occurred the plaintiff did tell him that she was not letting the horse do as it pleased but was avoiding holes. In essence therefore the plaintiff was aware that visitors to the beach on the soft sand (as opposed to the hard sand at the water's edge) were causing holes. Every time she went out she had to assess the area. When cantering she was aware that if there

was a hole which was very deep the horse could catch its fore leg and stumble.

[9] The procedure she followed was that upon entering the beach through the public entrance, she would walk, trot and canter the horse up the beach and then gallop back. When she did exercise the horses it was usually ¾/1 hour at a time. Between May and August only half the beach would be used. She was on the beach five days per week. There were significantly more holes in the two weeks before the accident according to the plaintiff in various places. However from day to day the situation did change. Two weeks before the accident she had told Mr Young of the problems with the holes and the depressions.

[10] On the date of the accident, both she and Marshall Carson were exercising two horses. Mr Young told her to exercise first on Ringend Rose. She started on a slow canter up the soft sand and a central part of the beach. She had had to move somewhat into her left so that Marshall Carson could come on the right hand side and was therefore on the softer area. The plaintiff assumed that Mr Young expected her to trust her own judgment. He had instructed her to take the horse at a steady canter up the middle of the beach and to come back at a quicker rate. The horse started off at barely a walk, then a trot, and then a canter.

[11] In the course of the canter she saw a significant hole in front of her and she had a split second to decide what to do. She felt that even if she pulled to the right she could bring down both horses. To the left there an area of rocks. She felt that she could get over the hole but in the event did not. The next thing she realised was when she woke up and had sustained very serious injuries. She did not know the exact mechanism of the fall but in the absence of the hole she assumed there was no reason why she would have fallen off. She had fallen off horses on a number of occasions in the past. Her judgment was therefore to get past this hole rather than to pull the horse up.

[12] I pause to observe at this stage that Mr Marshall Carson also gave evidence. His evidence, like that of the plaintiff, was that it was not uncommon to come across holes although as one progressed further up the beach the holes became more isolated because the public tended to use the areas close to the public entrances to the beach. It was his evidence, which I accepted, that one of the purposes in starting off at a walk and then to a trot before the canter was to identify holes or driftwood.

[13] His evidence was that he was about 5-6 lengths behind the plaintiff on the day of the accident. He saw the horse stumble, the plaintiff went over its head and the horse fell on top of her. He did not see what it was that made her fall. I am satisfied that this was the sequence of events. The plaintiff went

over the head of the horse and it fell on top of her causing her to sustain her injuries.

[14] I also observe at this stage that I accepted the evidence of the ambulance driver Mr Moore who was called on behalf of the plaintiff. After the accident he was summoned to the scene and he found her lying on the beach quite close to a hole. It was a fairly substantial hole about 4 feet square and one foot deep. It appeared to him to be a man-made hole in soft sand. She was approximately 3-4 yards away from this hole. I was satisfied that this was the hole that had caused the horse to stumble, throw the plaintiff off and the horse to land on top of her.

[15] I was satisfied that this horse had not stopped suddenly because I accepted the evidence of the plaintiff that she would have had some indication from the horse that this was going to happen.

[16] Mr Horner QC, who appeared on behalf of the second named defendant with Mr Quinn QC, drew attention to the fact that the medical notes made no mention of the hole at all. I was not impressed by this point since the state of the plaintiff at hospital must have been such that any description she gave was wholly unreliable. I am satisfied on the facts that I have already set out in paragraphs 11-16 as to the events leading to her injury. I was similarly unmoved by the references counsel drew to the lack of specificity in the pleadings in the statement of claim to a hole causing this accident. I admitted the statement of the plaintiff's deceased husband under the Civil Evidence (Northern Ireland) Order 1997 in which he described his wife relating to him shortly after the accident that she had been exercising the horse when it went into a hole and she fell off.

Coleraine Borough Council

[17] There were a number of facts which were common case with reference to CBC. First, it was accepted by all parties that it was the relevant occupier and lessee of the beach.

[18] On 24 May 1994 Coleraine Council passed a bye law introducing a ban on horses using the beaches between 10.30 am to 6.00 pm from 1 May to 30 September in each year. A notice was erected at the entrance to Whiterocks Beach specifying this.

[19] Evidence was given by council officials that horse riding also takes place on a number of other beaches owned and occupied by different councils including Moyle, Limavady, North Down, Newry and Mourne and Coleraine. These are coastal beaches where horse riding takes place and there are no warning signs concerning the dangers of such horse riding or any ban or zoning for the use of horses.

[20] At this location on Whiterocks Beach it was known that families frequently built sandcastles and dug holes in the beach especially during the summer months.

[21] CBC employed a Mr Howard to drive a tractor on the beaches under their control ie. East Strand Beach, Castlerock Beach, Downhill and West Bay Portrush .The tractor towed a mechanical rake designed to pick up litter and which in the event smoothed the surface. The tractor is designed neither to fill in holes nor to compress the sand and it is not part of Mr Howard's job to fill the holes in. He said that from time to time he came across holes which had resulted from the natural elements of wind and rain which were about 2 feet in diameter and perhaps up to six inches deep. This employee gave evidence that horses did leave deep depressions in the soft sand and he was concerned about race horses galloping through the soft sand. His concern was for elderly persons stumbling and injuring themselves as well as the possibilities of horses stumbling and they or their riders being injured. He had drawn this to the attention of the plaintiff's employer Mr Young some time before the accident. While he could not remember having done so, he thought that he probably did mention to some official also in Coleraine Borough Council. The conversation with Mr Young had taken place 2-3 months prior to the accident.

[22] It was accepted by Mr Wreath, Council Director of Technical Services and Mr Wilson, Council Health and Safety Officer, that no risk assessment had been carried out on the beach dealing with dangers arising from horse riding.

[23] However it was also common case that in 2005, a Mr McGregor of the Royal Society for the Prevention of Accidents ("ROSPA") had in the company of Mr Wilson carried out a risk assessment on the beaches of CBC. ROSPA have expertise on beach safety and indeed have published a document "Safety of British Beaches." Mr Wilson's job was to take Mr McGregor to the beaches and accompany him when carrying out the assessment. Two fatalities had occurred in the past through drowning. The assessment was carried out in conjunction with Moyle and Limavady Council. Mr Wilson told Mr McGregor about the horse riding accident involving Mrs Proctor – there had been no other accident with horses on the beach and no other complaints about same – although he did not tell him that the horse had fallen into a hole because Mr Wilson did not know that at this time. He was unaware what had caused the accident with the horse. Mr McGregor witnessed horses exercising on the Whiterocks Beach. ROSPA assessed the risks of injury associated with horse riding as low and did not recommend any further precautions to be taken. In terms therefore no recommendation was made by ROSPA that any further signs be erected or that any zoning or banning of horses be implemented.

[24] There was no challenge to the assertion by the witnesses on behalf of the CBC that until the date of this accident there had been no previous accident involving horses.

[25] It was the evidence of Mr Wilson that he did not think any further signage was necessary because he thought any dangers from holes occasioned to horse riders would be obvious.

[26] Subsequent to the evidence being completed in this case, and prior to my handing down a judgment, my attention was drawn to certain additional facts and in particular a proposal that horse riding might be banned on the beach. An affidavit from Kieran Joseph Doherty, the Director of Environmental Services was put before the court on behalf of CBC. Subject to one matter (see paragraph 29) Mr Fee QC, who appeared on behalf of the plaintiff with Mr Brown on behalf of the plaintiff, indicated that there was no issue in its contents. In essence it indicated that in January 2009, two complaints were received by the Council from individuals expressing concerns about the potential risks presented by horse riding on Whiterocks Beach. These complaints did not arise from actual accidents or injury to either horse riders or other beach users. The complaints arose out of horse boxes impeding access, fouling of the beach and risk to pedestrians. Mr Doherty also indicated that previous complaints relating to horses on beaches between 2001 and 2008 – six in number – were again unrelated to incidents where injuries had been sustained and mainly concerned amenity issues.

[27] Following the two complaints in January 2009, Mr Doherty expressed the view to the Environmental Health Department of CBC that it would be necessary to virtually have a constant presence on the beach to police time restrictions and compliance with Council bye laws related to the behaviour of horses. At the end of March 2009 he had a further conversation with Mrs McNally from the Senior Environmental Office and Mr Carmichael, Director of Leisure Services. Mr Doherty expressed the view that a complete ban of horses on the Council's beaches had certain attractions to him. It would make enforcement simpler for the Council's environmental officers in that it would be no longer necessary to prove that a horse was behaving dangerously or that a horse was on the beach outside the set times. It would therefore free up both manpower and resources for other projects. He therefore considered that for these reasons a ban merited consideration by the full Council. Mr Doherty averred that whilst the issues triggered by the two complaints were factors, it become clear that there were other factors to be considered, namely whether the presence of horses on beaches caused a nuisance by restricting other usage to an excessive degree and whether the current arrangements in place represented a disproportionate use of Council resources.

[28] Mr Doherty's report was submitted to the Committee of the Council on 7 April 2009 and by a majority the Committee agreed to recommend to the full Council that it should consider a ban of horses on its beaches. There remains a number of different options that will be available to the full Council when it considers the matter in due course. The Council could as yet reject the option of banning and explore alternative options. There would then have to be a period of further assessment and gathering of necessary information which will include a quality impact assessment to assess the potential impact of a ban on various sections of the public. This would entail taking soundings from different categories of beach user, including dog walkers, joggers, surfers and horse riders with a view to reaching a compromise in respect of their various needs. In short the whole matter is going out to consultation and in the opinion of Mr Doherty has nothing to do with the current action or the safety of horse riders.

[29] Mr Fee on behalf of the plaintiff accepted the thrust of Mr Doherty's affidavit but simply added that this illustrated that the ban now under consideration dilutes the suggestion by the CBC that horse riding was an important element in the Portrush experience.

Conclusions

[30] I commence my conclusions by recording that the catastrophic consequences of the accident and the immense courage shown by this plaintiff in the face of adversity cannot influence my decision as to whether there has been legal fault in this case on the part of the second named defendant. Mr Horner was correct to remind me of Lord Hoffman's cautionary statement in Tomlinson v Congleton B.C. [2003] UKHL 47 at paragraph 4 where he said:

> "… The law does not provide such compensation on the basis that the injury was disproportionately severe in relation to one's own fault or even not one's own fault at all. Perhaps it should, but society might not be able to afford to compensate everyone on that principle, certainly at the level at which such compensation is now paid. The law provides compensation only when the injury was someone else's fault."

[31] I was satisfied on the evidence before me that horse riding occurs on beaches all over the British Isles and certainly on a large number of beaches in Northern Ireland. Whilst there are risks inherent in this activity, I regard the exercise of training horses on a beach as no more dangerous than a host of other activities that take place on beaches. Horses can stumble, riders can fall and mishaps generally can occur in this as in other sporting activities. The

plaintiff well recognised that there is always an element of risk in such activities.

[32] Mrs Doherty the equestrian expert, on behalf of the plaintiff, conceded that even on firm sand when the tide is out, there can be quicksand and channels which may be difficult to see until the last moment and of course in softer areas, as happened in this incident, even holes which are filled up can be soft and treacherous. Horses will stumble or fall on any surface if their foot enters on certain grounds. The British Horse Society have published a leaflet "Riding on Beaches" which was provided to me by Mr Fee QC. It adverted to the dangers of riding horses on sand. Inter alia, it recorded as follows:

> "Sand
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> Be aware of varying texture and depth. It can be harder nearer to the water and softer further away. Deep, soft or hard sand can cause injury to horses, especially at speed. Riders should be aware that sand banks on beaches can go from hard to soft in less than a stride. If you want to ride at speed, it is sensible to walk or trot the beach beforehand to familiarise yourself with the surface. Be aware of dangerous holes in the sand – more common in the summer with children building sand castles – and streams or burns running onto beaches. These may be deep or cause soft deep patches that require jumping over."

[33] However this is one of the risks of engaging in such recreational sporting activity. Rock climbing can lead to falls if rocks give way under foot, divers can be injured if they do not execute their dive properly etc. The risk arises out of what the sportsman chooses to do rather than the state of the premises (see Lord Hoffman in Tomlinson's case at paragraph 27).

[34] The fact of the matter is that at the time the accident happened the plaintiff was, on her own admission, not travelling at speed on the horse but rather at a slow canter. The evidence of the equestrian expert called on behalf of the defendant Mr Eric Smylie seemed eminently sensible to me when he asserted that a race horse at a slow canter should not have found a hole of these dimensions to constitute any real difficulty and in his opinion in normal circumstances could handle such a difficulty well. Mr Howard who was responsible for cleaning up the beach of behalf of the CBC, indicated that holes two feet in diameter were a regular natural occurrence on beaches. Some had larger holes of the dimensions in this instance. Such holes must be inevitably anticipated given the presence of children and families.

[35] On her own admission the plaintiff acknowledged that she was well aware of presence of bumps/depressions on this terrain. She was an experienced horse woman who had been exercising horses on this precise area for up to eight months prior to this accident happening. In order to meet that difficulty, she was adopting the normal approach which was to initially walk the horse, then trot and then canter. I am satisfied that this plaintiff did have knowledge or foresight of the conditions that she encountered. She accepted the risks of falling off a horse or of a horse falling on her as all riders must. She had fallen from a horse in the past .She was aware of the presence of holes in the sand from past experience on this very beach. In many respects this was a locus classicus of the principle of volenti non fit injuria. I consider that this is not one of those rare instances where the occupier of this land, namely CBC, was under a duty to prevent her from taking risks which were inherent in the activity of horse riding which she freely chose to engage in. In my view there was no duty in common law to protect against this obvious risk. CBC was not her employer. This was a case where there was a genuine and informed choice made by the plaintiff. (See Lord Hoffman at paragraph 46 in Tomlinson's case).

[36] It did not surprise me therefore that the assessment made by Mr McGregor of ROSPA resulted in no recommendation for any further steps being taken. I find no reason to believe that any risk assessment which would have been carried out prior to 2005 by Mr Wreath or Mr Wilson would have arrived at any different conclusion. In my view it is unreasonable to have expected CBC to have made any different assessment from an acknowledged accident expert such as Mr McGregor of ROSPA.

[37] I regard it as significant that there was no history of any previous accident involving a horse or of any complaints to the CBC concerning their use on this beach in the context of personal injury to horse riders. I am satisfied that it was appropriate for the Council to be informed by this previous history in deciding whether or not any risk assessment was necessary in relation to the riding of horses on the beach and as to the necessity for banning horses or erecting warning signs to warn horse riders as to the dangers.

[38] A key component of the case made on behalf of the plaintiff was the failure to provide a warning of the dangers of man made holes caused by digging. In addition the plaintiff submitted that the existing notice on the beach should have been altered to forbid horse riding around the clock at particular times of the year or to forbid horse riding at speed due to holes in the sand. A further suggestion was that the Council should have zoned the beach to avoid conflict and dangers being created between horse riders and beach users digging holes in the sand.

[39] I consider that warnings in respect of such matters were unnecessary. The plaintiff was an experienced horse rider well aware of holes and depressions in this beach. Everyone must know that children on such beaches will dig sandcastles and sizeable holes in the beach. This plaintiff had in fact ridden horses for a period of eight months over the beach and she was more aware than most of such possibilities. A warning sign would have told her nothing that she could not see for herself or of which she was unaware. The dangers, if that is what they were, were obvious and were completely appreciated by this plaintiff. Indeed her employer had indicated that the process of exercising the horse would involve walking, trotting and then cantering for the very reason of ensuring that an opportunity was afforded to examine the terrain. It was the activity in which she was engaged, not the terrain, that created the danger in my view.

[40] An informative case in this regard is Evans v Kosmar Villa Holidays Plc [2007] EWCA Civ. 1003. In that case the plaintiff, holidaying in an apartment complex attached to the defendant tour operator, dived into the shallow end of a pool and hit his head on the bottom sustaining very serious injuries. The question arose as to whether there was a duty to exercise reasonable care to guard against what the plaintiff did. Rejecting the plaintiff's case, Richards LJ said at paragraph 41:

> "… Kosmar's duty of care did not extend, in my judgment, to a duty to guard the claimant against the risk of his diving into the pool and injuring himself. That was an obvious risk, of which he was well aware. Although just under 18 years of age, he was of full capacity and was able to make a genuine and informed choice."

[41] This echoes the words of Lord Shaw of Dunfermline in Glasgow Corporation v Taylor (1922) 1 AC 44 at 60 where he said:

> "In grounds open to the public as of right, the duty resting on the proprietors .. of making them reasonably safe does not include an obligation of protection against dangers which are themselves obvious."

[42] Similarly in Cotton v Derbyshire Dales District Council (1994) EWCA Civ. 17 where the plaintiff had gone for a hillside walk along a path on a cliff edge which he fell over, Henry LJ said at page 5:

> "It seems to me that any notice here of the sort suggested would simply have been pointing out a danger which, when it arose, would have been

> obvious. Once it was appreciated that there was no path, the danger of proceeding down a steep gradient where the footing was insecure and unstable and where you could not see what was over the brow, would have been obvious."

[43] It seems to me that the danger of the horse coming across this area of soft sand where children had dug large holes was perfectly obvious to this plaintiff. A sign to that effect would not have had the slightest effect. Moreover as I have already indicated, Mr Smylie was correct to indicate that a hole of this kind and dimension would not normally in any event create a problem for a horse at a slow canter. If signs were to be erected warning horse riders of such problems, then also would signs have to be erected to warn elderly people, those with a disability, runners, children playing with frizbees etc of such dangers? I do not consider that such an obligation is placed on the Council. In this particular instance I am satisfied that the Council is entitled to rely on the rider or her employer to take care to ensure that the usual vicissitudes of beaches did not cause a problem.

[44] Similarly I do not believe that Councils are bound to introduce zoning in order to protect horse riders. Holes will occur through normal weather conditions such as wind etc as well as through the normal activities of children. Zoning would not obviate the need to take care in any event. As Mr Horner properly pointed out, a considerable social utility and amenity of beaches is a factor which the Council can take into account in deciding whether areas should be zoned off from normal public use or not.

[45] I had before me in the British Horse Society document reference to a number of beaches in England, Ireland and Channel Islands. In most instances there were no restrictions at all on horse riding and in those where there were, issues of protection of wildlife or the interconnection between horses and holidaymakers appear to be the motivating factor. No such signage/warning/zoning/prohibitions was placed on other beaches by other Councils in Northern Ireland. I consider this Council was entitled to take into account the practice of other Councils in deciding only to ban horse riding on the beach between 10.30 am and 6.00 pm. I am satisfied that this is one of those instances where the defendant can avail of the fact that it has acted in accordance with general and approved practice albeit the test is always whether the precaution is one which the reasonable and prudent Council would think so obvious that it was folly to omit it. Thus where, as in this case, there is evidence that for a significant period of time a practice has been followed without untoward result, it must be regarded by this court as a strong indication that to follow that practice is consistent with the exercise of reasonable care. I recognise of course that this is not conclusive and I must bear in mind my duty to assess the practice against considerations of logic and commonsense. It may simply be good fortune that an accident has not

happened sooner. It may also be that in the years since the practice was instigated, knowledge and standards have moved on. (See Charlesworth and Percy on Negligence 11th Edition at para. 6-38). Nonetheless, having considered all these factors, I have come to the conclusion that there is good reason why this practice has been followed for many years without mishap and that is because any dangers in horse riding are self-evident whether carried on in a commercial or social setting. Any additional signage, zoning or banning would be wholly disproportionate in the circumstances. A ban that did exist between 10.30 am and 6.00 pm was in my view more than sufficient to ensure the reduction in risk to horses/beach users during those hours.

[46] For the same reasons I do not consider that the concerns raised by Mr Howard, the Council employee tasked with cleaning and raking beaches, added anything to the plaintiff's case. The risks of horse riding were as obvious to the plaintiff as they were to him.

The Occupiers' Liability Act 1957("the 1957 Act")

[47] The fact of the matter is that there is often little practical difference between a remedy under the 1957 Act and at common law (see Clerk and Lindsell on Torts 19th Edition at paragraph 12-04). All lawful visitors should be owed the same duty of care. The issue is one of fact to be determined with regard to all the circumstances of the case. Section 2(3) provides:

> "The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor so that (for example) in proper cases –
>
> ….
>
> (b) an occupier may expect that a person in the exercise of his calling, will appreciate and guard against any special risk ordinarily incident to it, so far as the occupier leaves him free to do so."

[48] It goes without saying that the common duty of care is more than a duty to avoid negligent acts, but extends to negligent omissions as well. Not only must the occupier avoid creating dangers himself, he must also take reasonable steps to protect his visitors from dangers which he did not himself create. In considering whether what was done or not done by the occupier was in fact reasonable, and whether in the particular circumstances of the case the visitor was reasonably safe, the court is free to consider all the circumstances, such as how obvious the danger is, warnings, the age of the visitor, the conduct to be expected of him and the state of knowledge of the

occupier. No duty is owed in respect of dangers which are entirely obvious to a reasonable visitor. Thus in Tomlinson's case, the House of Lords denied recovery to a swimmer injured by swimming in a lake who argued that his injury had been foreseeable and that he would not have suffered it had he been prevented from swimming at all. Lord Hoffman put the point thus at paragraph 45:

> "I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hand gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may think they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions … but the law does not require him to do so."

[49] In my view the law does not require Coleraine Borough Council to prevent, restrict or warn this plaintiff as to the risks inherent in riding horses over a beach. This is entirely the plaintiff's own affair. As I have already indicated I consider the dangers were obvious. Moreover she was aware of the obvious dangers that might lie in the wake of the horse and warnings would have been irrelevant in the circumstances of this case.

[50] In my view the law recognises this under the 1957 Act in the contents of Article 2(3) where it specifically states that the occupier may expect that someone such as the plaintiff will appreciate and guard against any special risks ordinarily incident to what he has been doing.

[51] In addition I consider that the law must be careful not to require an occupier to owe an employer's duty of care to somebody else's employees. That would impose on an occupier an even more rigorous duty of care in that it would require him to ensure that the employer was carrying out his own duty of care. I see no principled reason for imposing such a duty. (See Fairchild v Glenhaven (2001) EWCA Civ. 1881 at para. 150).

[52] In all the circumstances therefore I do not consider that there has been a breach of the occupiers' duty under 1957 Act.

Workplace (Health, Safety and Welfare) (Northern Ireland) Regulations 1993 ("the 1993 Regulations")

[53] The plaintiff in this case relies upon the Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993.

[54] Relevant provisions of the 1993 Regulations include the following:

Regulation 2(1):

> "In these Regulations, unless the context otherwise requires 'workplace' means, subject to paragraph (2) any premises or part of the premises which are not domestic premises and are made available to any person as a place of work."

[55] Regulation 4(2) of the Regulations provides:

> "(2) Subject to paragraph (4) every person who has, to any extent, control of a workplace … shall ensure that such workplace … complies with any requirement of these Regulations which –
>
> (a) applies to that workplace …
>
> (b) is in operation in respect of the workplace …
>
> (c) relates to matters within that person's control.
>
> (3) Any reference in this regulation to a person having control of any workplace … is a reference to a person having control over the workplace … in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or not)."

[56] I pause at this stage to consider the meaning of "undertaking" in the context of this case. Clearly CBC, who hold Whiterocks Beach under a lease from the Government, is an occupier of the area and takes responsibility for its maintenance and upkeep together with the regulation of activities on the beach. It does make bye-laws regulating the use of the beach. On the other hand it is clearly not carrying on a trade or business. A question for me to determine is whether or not it is carrying on "an undertaking". The phrase should be construed widely. (see Dr Sophie Redman Stiching v Bartol (1992) ECR 1-3189.

[57] Regulation 5(1) provides:

> "that the workplace … to which the regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair."

[58] A Code of Practice at paragraph 20 confirms that "efficient in this context means efficient from the point of view of health, safety and welfare". (see Coates v Jaguar Cars (2004) EWCA Civ 337).

[59] Regulation 12 provides:

> "Every floor in the workplace and the surface of every traffic route in a workplace shall be of a construction such that the floor or surface of the traffic route is suitable for that purpose for which it is used."

It was common case that this beach was not a floor in a workplace but Mr Fee argued that it was a traffic route in a workplace. Regulation 12(2)(a) provides that the surface of the traffic route shall have no hole or slope. The duty is limited by reasonable practicability. A traffic route is defined in Regulation 2 as "a route for pedestrian traffic, vehicles or both and includes any stairs, staircase, fixed ladder, doorway, gateway, loading bay or ramp". It was Mr Fee's submission that the area where the plaintiff's action had occurred was a traffic route and should not be used to exclude the use of a route by someone mounted.

[60] Regulation 13(1) provides that:

> "So far as is reasonably practicable suitable effective measures shall be taken to prevent the occurrence of any events specified in paragraph 3."

Paragraph 3 provides that:

> "The events specified are -
>
> (a) any person falling a distance likely to cause personal injury."

Mr Fee submitted that the defendant was in breach of that requirement in that no measures were taken to prevent the occurrence of this fall. He contended that it was reasonably practicable to have erected signs identifying the danger, to have ensured that the breach was kept at a level and safe condition and that access to the beach for horse training should have been prevented.

[61] Regulation 13(3)(b) provides protection against "any person being struck by a falling object likely to cause personal injury". Mr Fee's contention was the plaintiff was struck by a falling horse and suffered injury.

[62] Regulation 13(4) requires:

> "Any area where there is a risk to health or safety from the occurrence of any event specified in paragraph (3) shall be clearly indicated where appropriate."

Mr Fee argued that the defendant had failed to provide any such indication.

[63] Regulation 17(1) provides that "every workplace shall be organised in such a way that pedestrians and vehicles can circulate in a safe manner." Mr Fee drew attention to the Code of Practice at paragraph 163 which states:

> "Routes should not be used by vehicles for which they are inadequate or unsuitable. Any necessary restrictions should be clearly indicated. Uneven or soft ground should be made smooth and firm if vehicles might otherwise overturn or shed their loads …"

[64] Paragraph 164 records "sensible speed limits should be set and clearly displayed on vehicle routes except those used only by slow vehicles." Paragraph 166 provides "traffic routes used by vehicles should not pass close to any edge or anything that is likely to collapse." It was Mr Fee's contention that the term "vehicle" should not be interpreted as excluding a horse or interpreted solely as a mechanically driven vehicle.

[65] I have come to the conclusion that these Regulations do not assist the plaintiff in this matter for the following reasons. First, Mr Horner was correct to remind the court that these regulations were enacted to give effect to the United Kingdom Workplace Directive 89/654 where the purpose is described as being to encourage improvements "especially in a working environment, to ensure a better level of protection for the safety and health of workers at work under Article 1 of the framework directive" and in Section 2 imposes the obligations on employers.

[66] Clearly the 1993 Regulations went further than the minimum requirements of the directive by imposing requirements on persons other than employers. But nonetheless it seems to me that the context in which these Regulations came into force i.e. against the background of the directive should inform the interpretation. Hence for some time a vexed question had arisen as to whether or not non-workers could take advantage of the use of

such terms as "any person", "a person" or "pedestrians" in aspects of the Workplace (Health, Safety and Welfare) Regulations 1992 in England and Wales. In Northern Ireland, Sheil LJ cited Banna v Delicato 1999 SLT (Sh Ct) 84 as authority for the proposition that a self-employed worker could avail of the provisions. However after much travail, it now seems clear since Donaldson v Hayes Distribution Services Limited (2005) CSIH 48, a decision of the Inner House Court of Session in Scotland, that only workers can claim the benefit of the Workplace Regulations however loose the language in a particular Regulation may be. Ricketts v Torbay Council (2003) EWCA Civ 613 has come to a similar conclusion in England and Wales. Pure visitors cannot get round difficulties in proving negligence by relying upon the more onerous duties imposed on those who control workplaces under the Regulations. In short these cases indicate that words have to be interpreted in context and that the Workplace Regulations cannot be divorced from the Framework Directive and the subsequent Directive from Europe which spawned the 1993 Regulations.

[67] Whilst I am satisfied that the definition of premises can include a beach and that this plaintiff was in the employment of Mr Young, I question whether Parliament intended that beaches, huge tracks of National Trust property etc. were meant to fall within the ambit of the these Regulations when local councils might not even be aware that employees such as the plaintiff were on the beach.

[68] The dangers of too wide and uncertain an interpretation of such Regulations was highlighted by Lord Carswell in Smith v Northamptonshire County Council [2009]UKHL27 in a case dealing with an alleged breach of the provision and use of Work Equipment Regulations 1988. In that case the plaintiff was employed as a driver and carer by the respondents. Her work involved collecting a wheelchair patient from her home by means of a wooden ramp outside the doors which led from the living room to the patio. The edge of the ramp had crumbled causing her to sustain injury. At first instance the court held that the Regulations did apply because the ramp was "work equipment" as defined by Regulation 2(1) and it was being "used at work" within Regulation 3(1).In the House of Lords at paragraph 47 Lord Carswell said:

> "Once one starts to consider the scope of the Regulations it apparent that one has to consider whether there is some limit on types of equipment and work situation to which they extend and, if so, how and where it is to be drawn. …. It is desirable that the House should define the boundaries of liability in a way which is readily comprehensible by all those who have to operate the Regulations, a range

> of persons extending well beyond practising lawyers familiar with personal injuries litigation.
>
> 48. One possible, though extreme, solution would be to conclude that the employee is entitled to recover if he is injured in any circumstances when he is within the course of employment. Such a very wide approach, which echoes that of the old statutory scheme of workmen's compensation, would give an injured employee a ready means of obtaining compensation without having to search for a defendant who would be liable. It also has to be borne in mind that an employer can seek contribution from other parties who would if sued be liable. It would, however, be capable of generating much uncertainty about its extent, as witness the myriad of cases which fail to be decided under that legislation. It would involve a considerable departure from the principle of imposing liability upon those most responsible for the safety of workers. The enhancement of their safety and health and the prevention of accidents is one of the major aims of the Equipment Directive and the Regulations, and that wide approach would not accord with the emphasis on the employer's responsibility which appears in the Directives."

[69] I consider that the 1993 Regulations must be interpreted in a manner that will not involve a considerable departure from the principle of imposing liability upon those most responsible for the safety of workers. It seems to me therefore that Parliament cannot have intended that a public body such as this Council and those responsible for other vast tracts of areas such as National Trust properties were intended to be made responsible in circumstances where they may not even have known of the presence of other employees or the precise tasks they were performing.

[70] If I am wrong in so limiting the reach of the 1993 Regulations, I consider that Regulation 4(3) which confines liability to persons having control of a workplace in connection with the carrying on by him of a trade business or other undertaking does not embrace an instance such as the present where the Council has such limited responsibility for maintenance of this beach. I consider that the phrase "or other undertaking" must be eiusdem generis with "trade or business". To characterise the limited maintenance duties carried out by this Council as engaging in an undertaking would offend against a natural meaning of the wording. The phrase

"undertaking" is regularly used in other contexts as being similar to a trade or business and connotes some form of activity of the genre.

[71] I am not satisfied that the Council has this workplace under its control in the carrying on of an undertaking. Undertaking is clearly a word of variable meaning but the concept which is conveyed in the wording under scrutiny in this instance is that of a business or enterprise and I do not believe that it envisages the very limited tasks carried on by CBC.

[72] In any event the obligation under Regulation 5 in relation to the workplace is to maintain it in an efficient state, efficient working order and in good repair. I do not believe that permitting children to make sand castles and dig holes on a beach brings about a situation where the CBC have failed to maintain that beach in an efficient state, in efficient working order or in good repair. Once again it would offend against natural meaning of words to suggest that holes even of the dimensions mentioned in this case made by children or indeed by natural causes, create such a state when one of the very purposes of the facility is to encourage children to carry out this very activity. I cannot conceive of a duty on the CBC to fill in such holes or remove them. Moreover I do not consider that the sand was in a state contrary to article 5(1) for horse riders. I have already indicated that I accept the evidence of Mr Smylie that a race horse at a slow canter should not have found a hole of these dimensions to constitute any real difficulty and in his opinion in normal circumstances could handle such a difficulty well. It was the activity itself and its inherent dangers, freely accepted by and known to this plaintiff, that caused this unfortunate accident and not the state of the terrain.

[73] I am not satisfied that the stretch of beach where this accident occurred constitutes a traffic route within the terms of Regulation 12. If Parliament had intended that pedestrian traffic and vehicles were meant to include routes for animals then it could have so enacted. I believe that the specific mention of pedestrian traffic and vehicles is sufficient to exclude the circumstances of this case where horses were travelling. If I am wrong in this conclusion, it is not reasonably practicable to ensure that beaches where children are regularly present thereon will be kept free from holes etc. made by them at any given time of the day. How can the very activity for which the beach is provided be subjected to such steps?

[74] I am satisfied that there has been no breach of Regulation 13. It is not in my view reasonably practicable to take measures to prevent someone falling from a horse. In any event the distance from the horse to the ground is in my opinion not likely to cause personal injury and I had no evidence before me to that effect. I do not believe that the reference in 13(3)(b) to a person being struck by a falling object refers to a horse.

[75] I therefore consider that the 1993 Regulations do not avail the plaintiff in this instance.

Conclusion

[76] In all the circumstances I have come to the conclusion that I must dismiss the plaintiff's action.