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Judgment: approved by the Court for handing down | *Delivered:* **10/9/04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

JULIO FERRARI

Plaintiff;

-and-

THE NATIONAL TRUST FOR PLACES OF HISTORICAL INTEREST OR NATURAL BEAUTY

Defendant.

SHEIL LJ

[1] The plaintiff in this action is a 26 year old Italian from Modena. In the summer of 1997, on leaving school and before starting university, he arrived on holiday in Northern Ireland with some friends.

[2] On 3 August 1997 while visiting the Giant's Causeway, he sustained a fall at what is known as the Giant's Gate, which is part of the Giant's Causeway, thereby sustaining serious personal injury, loss and damage. Damages have been agreed in the sum of £85,000, subject to the issue of liability and any issue of contributory negligence.

[3] The Giant's Causeway, which is recognised as a world heritage site, is the principal tourist attraction in Northern Ireland, being visited by about 450,000 visitors a year. The National Trust for Places of Historical Interest or Natural Beauty, the defendant in this action, took over ownership and occupation of the site from a local family in 1962. There is no charge for admission to the site, which can be seen in a number of photographs which were produced to the court.

[4] There were no witnesses to the plaintiff's accident. The plaintiff's companions, who were lying down resting on the grass a little distance away, did not see him fall. The plaintiff stated that he had walked up over the basalt columns as seen in photograph 3 of the set of 7 photographs taken on 18 March 2002 by Mr McLaughlin, consulting civil engineer who gave evidence on behalf of the plaintiff. He sat down on top of one of the basalt columns which he marked with a dot and circle on photograph 7 and rested his feet on top of a column just below him. The plaintiff stated in evidence that as he got up from that position the column on which he had placed his feet moved and he fell forward to the ground to a point which he marked with an "X" on photograph 7, followed by parts of the column which fell with him landing on top of him.

[5] It was suggested in cross-examination by Mr Ringland QC, who appeared with Mr Bonner on behalf of the defendant, that the plaintiff had earlier visited the nearby Bushmills Distillery and that drink may have played a part in his fall. I am satisfied that the plaintiff did not visit the distillery and that there is no evidence to support that suggestion. Likewise I am entirely satisfied that the suggestion, based on anonymous information (the source of which could not be traced) recorded in the defendant's accident book to the effect that the plaintiff fell while jumping from one side of the gate to the other side, is entirely without foundation. Having seen the site of the accident for myself, it would have been impossible for the plaintiff to do so having regard to the width of the gap and the rough terrain on either side, comprising as it did of the basalt columns as seen in the photographs.

[6] While the statement of claim and the replies to the defendant's notice for further and better particulars in their original form stated that it was part of the basalt column on which the plaintiff had been sitting, which moved, I am satisfied that this was a misinterpretation of what the plaintiff had told his legal advisers, due probably in part to the plaintiff's then lack of fluency in English. It is to be noted that the defendant in its reply dated 25 April 2003 to the plaintiff's notice for particulars of contributory negligence alleged at particular (g) that the plaintiff was "standing on a rock when it was clearly unsafe and unreasonable to do so". I am entirely satisfied that the accident happened in the manner described by the plaintiff, who impressed me as being an honest and accurate witness. Despite objection by Mr Ringland on behalf of the defendant, I gave leave to the plaintiff to amend his statement of claim, while offering Mr Ringland the opportunity to adjourn the case if he was not in a position to deal with the amendment, which offer he declined.

[7] While there was no entry fee charged by the defendant for admission to the Giant's Causeway, it is clear that the plaintiff was a lawful visitor to the site and that the defendant, as owner and occupier of the site, owed to the plaintiff the common duty of care under Section 2(1) of the Occupiers' Liability Act (Northern Ireland) 1957. Section 2(2) of the Act provides that

"the common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

[8] The rock formation of the Giant's Causeway dates back to the Tertiary Age and consists predominantly of basaltic volcanic rocks. The gap in the rocks known as the Giant's Gate, as seen in photographs 7 and 8, is thought to have been manmade. It has however been there for a very long time as it appears in a painting of 1740. The accident occurred on a fine summer's day between 5.00 and 6.00pm. The plaintiff stated that the area was very busy with visitors, some of whom went much closer to the edge of the gate than the position which he had adopted when he sat down. I visited the site myself some days after the hearing and saw for myself that visitors climbed all over the Causeway, some of whom went out to the very edge of the Giant's Gate at the left hand side as one looks at photograph no. 7. There was nothing to prevent them so doing and there were no notices to the effect that they should not do so. The plaintiff stated in evidence that he did not see any warning notices of any kind, although it is clear that there were in position at the time a number of warning notices, warning against climbing on rock faces etc. None of the notices warned against the plaintiff going to the position to which he went on this particular day, nor was there any prohibition against his so doing. The risk of falling from the very edge if one went to that point was obvious to anybody and did not require any warning notice with regard to same: Staples v West Dorset District Council [1995] PIQR 429. In the present case I find that the plaintiff was in the position described by him in his evidence, which was a bit back from the edge; this was not a case of the plaintiff going to the very edge and falling over it.

[9] Mr McLaughlin, a Chartered Civil Engineer, gave evidence on behalf of the plaintiff. As already stated, on 18 March 2002 he took some of the photographs which were before the court. As appears from photograph 9, the gap at the Giant's Gate on the left side rises to a height of approximately 4 metres; the gap itself is approximately 10 ft wide. The basalt columns, as seen in photograph 8, lean outwards at an angle creating a gradient of 1 in 4. Mr McLaughlin stated however that in the absence of something else in the way of force being applied to them that gradient did not render them unstable. He accepted in cross-examination by Mr Ringland, that the chance of any of the columns falling was a "very low risk"; Mr Wright, a Chartered Civil Engineer, who gave evidence on behalf of the defendant, stated likewise.

[10] Professor Kenneth Pye, who is a Professor of Environmental Geology and is an independent Forensic Geo Scientist based at the Forensic Geo Science Unit at the Department of Geology of the University of London, gave evidence on behalf of the plaintiff. He is a Chartered Geologist and a Fellow of the Geological Society of London with more than 24 years' experience of

the analysis of rocks etc. He carried out an inspection of the site in the company of the plaintiff on 18 March 2002. He confirmed that the basalt columns do lean out at an angle from a true vertical upright position. He stated that the cracks as seen in the various photographs will be affected by the weather and will naturally widen due to their own weight thereby reducing their stability over a period of time which may eventually lead to collapse. He stated that an inspection of the area should be carried out at least twice a year, at the start and at the end of the season, with particular reference to carrying out a visual inspection of the cracks at critical areas such as the edge of the Giant's Gate and that in his opinion a pole of some kind ought to be used to poke them to check their stability. Professor Pye, while accepting that he was not an engineer, did not accept the opinion expressed by the two Consulting Engineers called on behalf of the plaintiff and the defendant, Mr McLaughlin and Mr Wright respectively, that the risk of a fall of rock at the Giant's Gate was a very low risk.

[11] Mr Mullan, who is now the Area Manager of the National Trust for the Southern and Eastern regions based at Rowallane in County Down, gave evidence on behalf of the defendant. He stated that at the material time he was the Area Manager for the Northern and Western regions of the Trust and as such the wardens for the Causeway would report to him. He stated that from enquiries made by him there had been no fall of rock at the Giant's Gate at any time either prior to or subsequent to the plaintiff's accident. He stated that the Trust had in place a regime of inspection of the Causeway on a monthly basis, or more frequently if necessary, which inspection was carried out by Mr William McNeill and other wardens. He stated that no written records were kept of these inspections, even to this day. He stated that a risk assessment was carried out in 1997, the record of which was destroyed in an office fire. He did produce to the court a risk assessment carried out in October 1998, following a drowning accident at the site and stated that there was also one for 2003. He stated that he himself had never carried out an inspection of the Giant's Gate and relied upon his staff, such as Mr McNeill, to do so.

[12] Mr McNeill, who has been the maintenance warden for the Giant's Causeway for over 23 years gave evidence on behalf of the defendant. He stated that in all of his time at the Giant's Causeway, there had never been a fall of rock from the Giant's Gate either before or since the plaintiff's accident. He was down at the site every morning throughout the year and he stated that if there had been any such fall, he would have been aware of it. While I accept Mr McNeill's evidence on this point I am very sceptical about his evidence that there was a regular monthly inspection. He stated that in his 23 years as warden at the site he had never found anything to report on foot of that monthly inspection, other than reports of litter and occasional vandalism. He accepted that no records were kept of such inspections.

[13] Mr Taylor, who retired from the National Trust in May 1999 and who also gave evidence on behalf of the defendant, had been the Head Warden for the North Antrim coast for 17½ years. At the time of this accident Mr McNeill, who was the Maintenance Warden, reported to him; he accepted that there were no records with regard to the alleged monthly inspections. He stated that he would be down at the Causeway on most days. Like the other witnesses who gave evidence for the defendant, he was not aware of any rock fall at the Giant's Gate either before or since the plaintiff's accident. While it was suggested by Mr Ferriss QC, who appeared with Mr McAlinden on behalf of the plaintiff, that the rocks lying on the ground as seen in some photographs, "O", "P" and "Q" (which unfortunately have gone missing), indicate falls of rock from the basalt columns in recent years, I do accept the evidence given on behalf of the defendant that there had been no fall of rock from the columns since the National Trust took over ownership and responsibility therefor in 1962, apart from the plaintiff's accident. Professor Pye stated that in his opinion the rocks seen in those photographs had either fallen down some decades ago or were those which had fallen down at the time of the plaintiff's accident and which had been moved to that position as seen in those photographs. Having seen those rocks for myself in the course of my visits to the site, I consider that his opinion in relation to this point is correct.

[14] Mr Maudsley, who was the Chief Environmental Officer with Moyle District Council in whose area the Giant's Causeway lies, gave evidence on behalf of the defendant. He held his position as Chief Environmental Officer from 1993 to 1998. He carried out an investigation following the plaintiff's accident. He confirmed that during his period in office there had been no falls of rock at the Giant's Gate. Following the plaintiff's accident his department carried out an investigation and decided that no prosecution should be brought against the defendant nor did he suggest that any change with regard to the safety of visitors should be carried out at the Giant's Gate.

[15] While, as stated above, I have considerable reservations about the evidence of Mr McNeill with regard to the alleged monthly inspections, I do accept the evidence given on behalf of the defendant that, since the defendant took over the site in 1962, there had been no fall of rock at the Giant's Gate apart from this particular occasion.

[16] Before turning to the liability, if any, on the part of the defendant for the plaintiff's accident, it is perhaps convenient at this stage to state that I do not consider that the plaintiff was guilty of any contributory negligence causing this accident.

[17] Was the defendant guilty of any breach of Section 2 of the Occupiers Liability Act (Northern Ireland) 1957? Mr Ringland, counsel for the defendant, referred the court to the recent decision of the House of Lords in

Tomlinson v Congleton Borough Council [2004] 1 AC 46, [2003] 3 All ER 1122. In that case the defendants were the owners and occupiers of a public park which included a lake with sandy beaches where members of the public frequently swam despite notices erected by the defendants stating "dangerous water: no swimming". On a hot day in May 1995 the plaintiff, who was aged 18, went into the lake and from a standing position in shallow water dived and struck his head on the sandy bottom, breaking his neck which resulted in his being paralysed from the neck downward. Counsel for the plaintiff accepted that the plaintiff, having entered the park as a lawful visitor became a trespasser on entering the water contrary to the warning notices. He claimed damages against the defendants, alleging that the accident had been caused by their breach of the duty of care which they owed to him as a trespasser under Section 1 of the Occupiers Liability Act 1984, the equivalent legislation in Northern Ireland being the Occupiers' Liability (Northern Ireland) Order 1987. The judge, on a preliminary issue as to liability, found that there had been nothing about the lake that had made it any more dangerous than any other ordinary stretch of open water and that the danger and risk of injury from diving in it where it was shallow had been obvious. He dismissed the plaintiff's claim. The Court of Appeal by a majority allowed the plaintiff's appeal. The House of Lords allowed an appeal by the defendants, holding that, even assuming that the circumstances of the case were such that a duty had been owed to the plaintiff as a lawful visitor under Section 2(2) of the Occupiers' Liability Act 1957 [which is equivalent to the Occupiers' Liability Act (Northern Ireland) 1957] and that there had been a risk attributable to the state of the premises rather than to the acts of the plaintiff, the question of what amounted to "such care as in all the circumstances of the case is reasonable" depended not only on the likelihood that someone might be injured and the seriousness of the injury which might occur, but also on the social value of the activity which gave rise to the risk and the cost of preventative measures, which factors had to be balanced against each other. Their Lordships held that, even if swimming had not been prohibited and the defendants had owed a duty to the plaintiff as a lawful visitor under Section 2(2) of the 1957 Act, that duty would not have required them to have taken any steps to prevent the plaintiff from diving or warning him against dangers that were perfectly obvious.

[18] While in the present case there is no suggestion that the plaintiff was a trespasser as distinct from a lawful visitor, the speeches of their Lordships are pertinent to the present case.

[19] Lord Hoffman at paragraph 27, page 80B stated:

> "Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk. The risk was that he might not execute his dive properly

and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity. In the present case, Mr Tomlinson knew the lake well and even if he had not, the judge's finding was that it contained no dangers which one would not have expected. So the only risk arose out of what he chose to do and not out of the state of the premises.

There was no risk to Mr Tomlinson due to the state of the premises or anything done or omitted upon the premises. That means that there was no risk of a kind which gave rise to a duty under the 1957 or 1984 Act. I shall nevertheless go on to consider the matter on the assumption that there was."

At paragraph 32, page 81H Lord Hoffman continued:

"Even if Mr Tomlinson had been owed a duty under the 1957 Act as a lawful visitor, the council would not have been obliged to do more than they did.

My Lords, the majority of the Court of Appeal appear to have proceeded on the basis that if there was a foreseeable risk of serious injury, the council was under a duty to do what was necessary to prevent it. But this in my opinion was an over simplification. Even in the case of the duty owed to a lawful visitor under Section 2(2) of the 1957 Act and even if the risk had been attributable to the state of the premises rather than the acts of Mr Tomlinson, a question of what amounts to 'such care as in all the circumstances of the case is reasonable' depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the

> risk and the cost of preventative measures. These factors have to be balanced against each other."

Lord Hoffman continued at paragraph 45, page 84H:

> "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 maybe thinks that they are danger or inconvenience to himself or others. Or he may take a paternalistic view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the council did by prohibiting swimming. But the law does not require him to do so.
>
> My Lords, as will be clear from what I have just said, I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard responsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. ---- So this appeal gives your Lordships the opportunity to say clearly that local authorities and other occupiers of land are ordinarily under no duty to incur such social and financial costs to protect a minority (or even a majority) against obvious dangers. ----- I consider that even if swimming had not been prohibited and the council had owed a duty under Section 2(2) of the 1957 Act, that duty would not have required them to take any steps to prevent Mr Tomlinson from diving or warning him against dangers which were perfectly obvious. If that is the case, then plainly there can have been no duty under the 1984 Act. The risk was not one against which he was entitled under Section 1(3)(c) to protection."

[20] Lord Hutton in the course of his speech stated at paragraph 53, page 87A:

> "In relation to Section 1(1)(a) of the Occupiers Liability Act 1984 I recognise that there is force in the argument that the injury was not due to the state of the premises but was due to the respondent's own lack of care in diving into shallow water. But the trial judge found that Mr Tomlinson could not see the bottom of the lake and, on balance, I incline to the view that dark and murky water which prevents a person seeing the bottom of the lake where he is diving can be viewed as `the state of the premises' and that if he sustains injury through striking his head on the bottom which he cannot see this can be viewed as a danger `due to the state of the premises'. If water were allowed to become dark and murky in an indoor swimming pool provided by a local authority and a diver struck his head on the bottom I consider that the danger could be regarded as `due to the state of the premises', and whilst there is an obvious difference between such water and the water in a lake which in its natural state is dark and murky, I think that the term `the state of the premises' can be applied both to the swimming pool and to the lake."

Lord Hutton, having referred to a number of long established authorities went on to say at paragraph 59, page 88H:

> "They express a principle which is still valid today namely that it is contrary to common sense, and therefore not sound law, to expect an occupier to provide protection against an obvious danger on his land arising from a natural feature such as a lake or a cliff and to impose a duty on him to do so. In my opinion this principle, although not always explicitly stated underlies the cases relied on by the appellants where it has been held that the occupier is not liable where a person has injured himself or drowned in an inland lake or pool or in the sea or on some natural feature."

Lord Hutton concluded his speech by stating at paragraph 65, page 90H:

> "Therefore I consider that the risk of the plaintiff striking his head on the bottom of the lake was not one against which the defendants might reasonably have been expected to offer him some protection, and accordingly they are not liable to him because they owed him no duty. I would add that there might be exceptional cases where the principle stated in *Stevenson v Glasgow Corporation* [1908] SC 1034 and *Glasgow Corporation v Taylor* [1922] 1 AC 44 should not apply and where a claimant might be able to establish that the risk arising from natural feature on the land was such that the occupier might reasonably be expected to offer him some protection against it, for example, where there was a very narrow and slippery path with a camber beside the edge of a cliff from which a number of persons had fallen. But the present is not such a case and, for the reasons which I have given, I consider that the appeal should be allowed."

Lord Hobhouse in the course of his speech stated at paragraph 69, page 92E:

> "The first and fundamental definition is to be found in both Acts. The duty is owed `in respect of dangers due to the state of the premises or to things done or omitted to be done on them'. In the 1957 it is Section 1(1). In the 1984 Act it is in Section 1(1)(a) which forms the starting point for determining whether any duty is owed to the trespasser (see also Section 1(3)) and provides the subject matter of any duty which may be owed. It is this phrase which provides the basic definition of `danger' as used elsewhere in the Acts. There are two alternatives. The first is that it must be due to the state of the premises. The state of the premises is the physical features of the premises as they exist at the relevant time. It can include footpaths covered in ice and open mineshafts. It will not normally include parts of the landscape, say, steep slopes or difficult terrain mountainous areas or cliffs close to cliff paths. There will certainly be dangers requiring care and experience from the visitor but it normally would be a misuse of language to describe such features as `the state of the premises'. The same could be said about

> trees and, at any rate, natural lakes and rivers. The second alternative is dangers due to things done or omitted to be done on the premises. Thus if shooting is taking place on the premises a danger to visitors may arise from that fact. If speedboats are allowed to go into an area where swimmers are, the safety of the swimmers may be endangered."

Lord Hobhouse concluded his speech by stating at paragraph 81, page 96H:

> "------------ it is not, and should never be the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. Does the law require that all trees be cut down because youths may climb them and fall? Does the law require the coastline and other beauty spots to be lined with warning notices? Does the law require that attractive waterside picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no. But this is the road down which Your Lordships, like other courts before, have been invited to travel and which the councils in the present case find so inviting. In truth, the arguments for the claimant have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen."

[21] In the present case the plaintiff was not engaging in an activity which involved a foreseeable risk of some of the basalt columns collapsing, nor was he involved in going to the very edge of the Giant's Gate which clearly would have exposed him to the risk of his falling over the edge. There was no obvious danger in doing what he did, which was what many other visitors

have done before and since this accident without any mishap. I consider that this accident was due to "the state of the premises" in that some of the basalt columns, unknown to anybody, had become unstable. However, having regard to the defendant's evidence, which I accept, that there had been no fall or collapse of any part of the basalt columns since the defendant took over the site in 1962,I do not consider that the plaintiff has established that the defendant was guilty of any breach of the duty owed to him under Section 2 of the Occupiers' Liability Act (Northern Ireland) 1957 which, as already stated, is "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there." Accordingly I have to dismiss this claim.

[22] Now that this accident has occurred, the defendant is on notice that some of the basalt columns may collapse if merely stood upon. That, in my opinion, puts an onus on the National Trust to ensure that regular visual monthly inspections are carried out at the Giant's Gate to detect possible weaknesses in the basalt columns at that particular location, where a visitor may fall a distance of 4 metres or more, and to take such remedial steps as in the all the circumstances of the case are reasonable to see that the many thousands of visitors who continue to visit this remarkable site will be reasonably safe in so doing. This does not mean that the Trust has to carry out an inspection of every basalt column at the Giant's Causeway, but merely those at or near the edge of the Giant's Gate. Nor does it mean that the Trust, in the absence of any weaknesses detected at the monthly visual inspections, has to erect warning notices or barriers at or near the edge of the Giant's Gate to guard against a person going too close to the edge and simply falling over it, a danger which is self evident.