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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

KIERAN McANNENY

-v-

BRIAN McCAY

HIGGINS J

[1] The plaintiff was born on 8 September 1979 and is now aged 25 years of age. The defendant is his uncle. He resides at 52 Primrose Park, Sion Mills near Strabane, Co Tyrone from which premises he carried on, inter alia, the business of mushroom farmer. He employed a number of employees on the premises. Initially the plaintiff's father was employed by the defendant. Then he acquired a van and sold the defendant's mushrooms, until a serious disagreement over money about 1994, lead to a breakdown of relations between them. That situation remains.

[2] On 30 June 1990 when the plaintiff was 10 years of age his father brought him to the defendant's premises to play with his cousins. They were the defendant's children Brian Junior and Sonia both of whom were older than the plaintiff. There was another boy called Paul Holland also on the premises playing with the defendant's children. The premises comprised the dwelling house, a large yard containing outbuildings and several mushroom tunnels. There were outside taps attached to the gable of the house adjacent to a concrete apron with a central drain where vehicles could be cleaned. Beside the mushroom tunnels were outdoor safety power points. There were other standard power points in the outbuildings between the house and the mushroom tunnels. The defendant owned a pressure power hose for cleaning the tunnels and his vehicles. This required water and electricity supply.

[3] Some time during the day the plaintiff sustained a serious injury to his right eye. The plaintiff gave evidence that around lunchtime he was playing with the others with wet cloths when he was caught by Sonia and held. Paul Holland lifted the power hose and fired a jet of water at the plaintiff hitting him in the right eye. The plaintiff went to his uncle the defendant who was in one of the sheds near the mushrooms and told him he had been hit in the eye with the power hose. His uncle told him to go to the house and put a wet teabag on it. He did so. He was crying and in a bit of shock. He lay down on the sofa and fell asleep. A short time prior to Paul Holland lifting the power hose someone was using it to clean a tractor beside the house. The tractor was then taken away, leaving the power hose beside the house. According to Mr McBride the consulting engineer engaged on behalf of the plaintiff the pressure that emerges from such a power hose is about 1500 lbs per square inch. The average household tap is about 80 lbs per square inch. He said such power hoses are potentially dangerous in the wrong hands and children should not be permitted to play with them. When they are no longer required the power should be switched off, the water disconnected and the machine put in a safe place.

[4] Mrs Susan McCay the defendant's wife returned from her dry cleaning business in Strabane some time around 6pm. She found the plaintiff watching TV in the living room while the others were outside playing. She asked him why he was not outside with them. Eventually he said he had a sore eye. She asked him what happened. He said he was "hit in the eye with a water gun". She inquired from the other children and received the same response. She asked the plaintiff how it happened, but he refused to tell her. She asked the other children and none of them "could throw any light on it".

[5] Mrs McCay took the plaintiff home and then drove him and his mother first to the Health Centre and then, on the advice of the doctor, to Altnagelvin Hospital where the plaintiff was admitted and detained for a week. The Casualty notes record the history as "playing with high pressure water hose and hit right eye". The inpatient notes record "hit by water from high pressure hose, children playing with it". It was suggested to the plaintiff in cross-examination that he was playing with the water hose somewhere in the yard and that he pulled the trigger and hit himself in the eye. No evidence was adduced by any person that this was what had occurred. It is highly unlikely for two reasons. Why would a person shoot himself in the eye, even accidentally? The plaintiff was 10 years of age. How could he hold the lance of the power hose and turn it on himself and pull the trigger in order to hit himself in the eye? Late in the defence case there was a suggestion that the plaintiff was injured while playing with a toy gun that fired water, referred to as a "pump gun". It was said these were popular with children at that time though the defendant's children did not have one. It was not suggested to the plaintiff that he was injured in this way.

[6] When the plaintiff was admitted to hospital he was found to have sustained a corneal abrasion and a hyphema or bleeding within the eye. He developed a traumatic cataract in that eye. He was detained in hospital until 6 July 1990 while the hyphema settled. After leaving hospital he was reviewed from time to time until 1994 when he was discharged. At that time his visual acuity was 6/12 in his right eye and 6/5 in the left eye. Examination by Miss MEA Hanna a Consultant Ophthalmic Surgeon in 1998 revealed visual acuity of 6/18 in the right eye and 6/6 in the left eye. She noted a central white opacity or white spot (leukoria) in the lens which is indicative of the cataract as well as tears of the pupil margin and a deepening of the anterior chamber. The white spot is clearly visible at close range. Miss Hanna's opinion was that the plaintiff's right eye "shows all the signs and symptoms of a severe blunt injury such as he could sustain with the power hose". Her evidence was that the injury was consistent with the history given of being struck in the eye by the jet from a power hose. She did not think it could have occurred from being hit with the jet of an ordinary garden hose. This was a really serious injury like being hit in the eye with a squash ball. It could not have been caused by a thump in the eye with a fist. In April 2002 the visual acuity of the right eye was 6/9 and 6/4 in the left eye. Surgery to remove the cataract is possible but as the cataract is trauma-related rather than age-related it would be more complicated surgery with attendant risks. Whether to undertake the surgery would require balancing the risks involved with how the plaintiff is coping with his defect. As he gets older the balance may swing in favour of surgery but not at this stage. In addition to the deficient sight in his right eye the plaintiff also experiences occasional pain in the eye and a reaction to bright light. After leaving school he served his time as a joiner, in which occupation he is currently employed.

[7] In 1997 the plaintiff saw a television advertisement about claims for personal injury. As a result he went to see his solicitor. It seems he was advised to go to the police and make a statement and to lodge a criminal injury claim implicating Paul Holland in the incident whereby his eye was injured. Previously he had told his parents about this incident but no-one else. It seems the defendant was never taxed about it by the plaintiff's family. The plaintiff contacted the police and on 4 November 1997 made a statement to them. In that statement he said –

> "I am the above named person at an address know to police. On the 30.6.1990 I was at 52 Primrose Park, the home of my uncle, Brian McKay. Around 12.30 pm I was out playing in his yard with my cousins, Brian McKay, who was approximately 13 years, Sonya McKay, who I think was about 14 and Brian's friend, Paul Holland, who was also about 13 from Carlton Drive, Strabane. We were running around the house firing wet clothes at each other. Sonya

> McKay caught up with me at the side of the house where the kitchen window was. She held my hands behind my back. Paul was standing at the kitchen window holding a power hose at me. He was approximately 9 feet away from me and he pointed the hose in the direction of my face. Water came out and a jet of water hit me on the face and in my eye. I can't remember if Paul turned the power hose on while Sonya was holding me. All I can remember is that when the water initially hit my face, it wasn't sore but my eye was sore to open. I then went down the yard to find my uncle. He told me to go and put a wet teabag on my eye. I then went up to the house and done this. I fell asleep. Sometime later my aunt, Susan McKay, came home. She looked at my eye and said we would need to get it seen to. Aunt Susan then took me home to my house to pick up my mother. At approximately 7.00 pm we went to Altnagelvin Hospital to the Accident and Emergency Unit. I was kept in the hospital for approximately one week. As a result of this accident I sustained a cataract in my right eye and tended an eye specialist for approximately two years thereafter. At the time of the accident I don't think Brian McKay was with us, he was around the other side of the house."

[8] He told the police he was prepared to give evidence against Paul Holland. He said he was unaware that he would have to blame someone in order make a claim for criminal injury compensation. He accepted that parts of the statement were not correct and volunteered others were not correct, but maintained the general nature of his complaint was true. He said he was able to remember the date as the 1990 World Cup was on and the Republic of Ireland were playing Italy that day. It was put to him in cross-examination that his cousin Sonia said that the incident as described by him did not happen. He replied that on the day when he told his Aunt Susan (Sonia's mother) what happened that Sonia was present in the living room and she denied it happened before she was asked. It was also put to him that his uncle the defendant was not present on the premises on that day. The plaintiff maintained he was.

[9] Sonia McCay is 29 years of age and manages her parent's dry cleaning business in Strabane. She gave evidence that no such incident as described by the plaintiff occurred that day and that specifically she never held him at any time. In fact she was not playing with the plaintiff but was elsewhere with her own friends and only saw the plaintiff from a distance. She said the boys were playing with her brother Brian's quad bicycle that day. She only learnt of his

injury when she was called for dinner. She had not denied the plaintiff's account to her mother. She said there was "no real big hullabulloo about it at the time and no family discussion about it". She was sure her mother would have asked if she knew anything about it and she probably said she did not know. She stated that there were no vehicles in the yard near the house though there may have been near the mushroom tunnels. She described how they would be given duties to carry out about the yard but if the defendant was not present they would play. On this day they were playing so she assumed her father was not present. If their parents were not present they were supervised by some of the employees. She was only asked to think about this day when the police called to investigate the plaintiff's claim.

[10] The defendant gave evidence that he was in Dungannon all day and only became aware of the injury to the plaintiff on his return. He saw him in the living room and asked him what was wrong. The plaintiff just grunted and would not answer. He thought it was "no big deal" and went back to his work for the rest of the evening. He said it was completely untrue that someone was cleaning a vehicle beside the house. He had an "apron" near the mushroom tunnels for doing so. He said the house was pebbled-dashed and to wash a vehicle there would destroy the pebble-dash. He said there was not one word of truth in the plaintiff's account that the plaintiff spoke to him after the incident and that he advised him to put a cold tea bag over it. He said he never owned a power hose that connected to an ordinary mains supply; they always used one with a safety plug that connected to the outside safety socket close to the mushroom tunnels. His employees were instructed how to leave the power hose after use and to return it to the small shed. He no longer has the power hose that was in use then though he was able to produce a safety plug with a short piece of wire attached which was photographed. When he was cross examined he was less sure that he was in Dungannon that day, in fact he could not say exactly where he was. He said that wherever he was he arrived home that evening, though he had no business records to show where he might have been on that day. When asked who was supervising the children he was somewhat hesitant and then said his brother-in-law would have been and there probably was someone in the house as well. He confirmed that he had an Accident Book. When asked why he did not record the injury in the Accident Book he replied "Why would I write it down if it did not occur on my premises. According to all my children's' evidence it did not occur on my premises". He suggested the injury might have occurred somewhere on the road between Strabane and Sion Mills. He said there were definitely high pressure water guns in the area at that time. According to his children the plaintiff did not have it. He added" We think he was injured by another child".

[11] There are some unusual features to this case. There has been a significant passage of time, much of it when the plaintiff was still a minor. No approach appears to have been taken by either of his parents in the years that

followed. Seven years later the plaintiff was prompted by a television advertisement. On the advice of his solicitor he made an application for criminal injury compensation. The plaintiff made a statement to police, parts of which he now says are inaccurate. The defendant is a close relation with whom the plaintiff's father had a disagreement over money. The relationship between the families now seems to be non-existent.

[12] The plaintiff sustained a serious injury to his eye and considerable concentrated force would have been required to inflict that injury. According to his aunt he said it was inflicted by a water gun. The hospital notes record on the day that it was a high pressure hose. A water gun may have been the plaintiff's way of describing it, but clearly it was being ascribed on that day to an instrument emitting a jet of water. The medical evidence is consistent with a high pressure hose and one was available at the defendant's premises. I do not think it was a water gun, nor do I consider that such was on the premises that day. The plaintiff's account of some of the events and happenings of that day have been distorted or become hazy through the passage of time. He was 10 years of age at the time. However I am satisfied that the central core of his evidence is correct namely, that he was hit in the eye by the water jet from a high pressure hose. It was suggested that he had injured himself. I think that would be almost impossible for a boy of his age. The device has a lance with the trigger some distance from the nozzle. No dimensions of the pressure hose were given, though Mr McBride produced photographs of a type of pressure hose. The lance is clearly visible and would require to be of similar length in order to hold and direct it. In any event why would a 10 year old child turn a high pressure hose on himself and in particular at his face. It is so highly improbable that I am satisfied that it did not happened. The hospital records support the view that on the day other children were involved and that they were playing with the device. The evidence of the defendant and his witnesses did not undermine the central core of the plaintiff's evidence, that he was hit by the jet from the power hose, fired probably by Paul Holland. At times the impression created tended to confirm that the plaintiff was basically telling the truth about how he sustained this injury.

[13] For the plaintiff to be injured in this way the power hose had to be out in the yard, connected to the water supply and to the electricity and turned on. While the children may have done that, it is more likely that the plaintiff's account is correct, that it was being used by one of the employees who left it lying in the yard, connected to the water and electricity and still switched on. The children who were playing in the yard seized their opportunity. The conspiracy of silence that followed the return of their mother reinforced the view that they knew they had done something of which their parents would have disapproved. This was a strict household in which the children were given duties to perform on the premises and expected to fulfil them. If they were caught misbehaving they would be punished. Typical of children of that age no one was prepared to own up, including the plaintiff.

[14] A power hose with a water pressure of 1500 lbs per square inch is a dangerous article. It requires to be handled and looked after with extreme care. It should not be left unattended, connected and switched on, particularly when children are playing in the vicinity. If someone was assigned to supervise the children, it is clear that he or she was not doing so at the critical time. There is no evidence of any distraction or emergency that may have diverted an employee's attention. While the time between the cleaning of the vehicle and the incident appears to have been short it was not so short that the person responsible for leaving the power hose unattended or the person who was supervising, if any, should be absolved from responsibility. The plaintiff was a visitor to the premises who was owed the common duty of care. Section 1(1) of the Occupier's Liability 1957 Act provides that the rules, enacted by sections 2 and 3 of the Act shall have effect in place of the rules of common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them. Section 2(1) stipulates that the duty owed by an occupier is the common duty of care. Section 2(2) defines the common duty of care –

> "2(2) 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."

[15] Section 2(3) provides, inter alia, that an occupier must be prepared for children to be less careful than adults and should not underestimate their resourcefulness for getting into mischief. Reasonable foreseeability of physical injury creates the duty of care. The extent of the duty of care is determined by whether or not the injury falls within a description which could be said to be reasonably foreseeable; not the precise injury that occurred but injury of a certain or particular description. The description is determined by the nature of the risk that ought to have been foreseen.

[16] The plaintiff and the other children were already engaged in play around the house in the yard. It was foreseeable that if the power hose was left unattended and switched on , or the children left unsupervised with the power hose unattended and switched on, that the children might include the device in their play and pull the trigger thus causing injury of a type caused by water pressure directed at another person.

[17] I am therefore satisfied on the balance of probabilities that the plaintiff has established that the defendant is liable in negligence and breach of statutory duty. I assess damages in the sum £20,000 and there will be judgment for the plaintiff in that sum.