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Judgment: approved by the Court for handing down | *Delivered:* **13/04/2005**

(subject to editorial corrections)

2000 No 4628

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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MARK HARTOP

-v-

WESTERN EDUCATION AND LIBRARY BOARD

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MORGAN J

[1] The Plaintiff was born on 19 February 1980. In June 2000 he joined a course run from a youth club in Shantallow, Derry by the Defendants in conjunction with the Prince's Trust. Part of the course comprised a residential element at an outdoor pursuits centre at Gortahole, Enniskillen

[2] Nineteen people took part in the residential element which commenced on 27 June 2000. Declan McAleer was the supervisor who travelled with the group and Dave Scott was the instructor at the centre who assisted in respect of the activities. There was fine weather on the first day. Between 8.30 pm and 9 pm most of the group wished to go for a swim in the lake which was part of the outdoor pursuits area. Permission was sought and obtained from Mr Scott who was finishing his shift leaving Mr McAleer in charge on his own. The group were told by Mr McAleer that each of them had to wear a buoyancy aid and helmet. Even good swimmers were told that this was required by Gortahole.

[3] All of those involved gathered at the canoe store which was some 300/400 metres from the forecourt and jetty shown in the photographs. Although most of the group wanted to swim a few had decided not to do so. I accept the evidence of Mr McAleer that each member of the group proposing to swim was provided with an appropriate buoyancy aid and helmet. The group then made their way to the lakeside. The Plaintiff and Robert Downey were at the front of the group. Mr McAleer had to note the equipment distributed and lock up the canoe store. He, therefore, was with those at the rear of the group. As he walked down Mr McAleer was not in a position to see those at the front of the group.

[4] When the Plaintiff reached the concrete forecourt area he decided to dispense with his buoyancy aid and helmet. He made his way onto the jetty at the furthest point shown on P4. He was followed by Mr Downey who may also have abandoned his aid and helmet. The jetty floats at a height of 13 inches above the level of the water. The Plaintiff who is an experienced swimmer looked into the water but could not tell how deep it was. Nevertheless he decided to dive in as a result of which he struck his head on the lake bed. In cross examination he accepted that this was madness on his part because one should never dive into water the depth of which is unknown.

[5] The depth of the water in the photographs at the end of the jetty was 1 metre increasing to 1.1 metres at a point 5 metres out. It seems likely that the position was broadly similar at the time of the accident although the depth of water in the lake can vary. As a result of the incident the Plaintiff sustained a fracture of the superior body of C7 which required treatment with a collar for a number of months and still gives rise to discomfort.

[6] Mr McAleer says that he told the group at the canoe store that they should proceed to the lake where the equipment would be checked. The Plaintiff did not give evidence of hearing such instruction and it seems to me likely that he had set off for the lake with Mr Downey without hearing that instruction. These two arrived before anyone else at the concrete forecourt which gives access to a jetty and the slipway which Mr McAleer intended should be used for access. They were making their way onto the jetty as others were arriving at the forecourt. Although the Plaintiff says that Mr McAleer was with the group on the forecourt when he had reached the end of the jetty it seems likely that the Plaintiff's view of that group would have been limited as he was travelling with his back to the forecourt area. I conclude that the rest of the group remained in the forecourt area and this supports the view that they were instructed to do so by Mr McAleer. The Plaintiff would have been aware of the group gathering on the forecourt but there is no reason why he should have particularly noticed Mr McAleer. Indeed he may have been anxious to get into the water without his buoyancy aid and helmet before Mr McAleer saw that he was contravening his instruction.

[7] Mr McAleer says that he did not see the Plaintiff go into the water. Given the number of people at the forecourt it is not surprising that he failed to notice that the Plaintiff and Mr Downey had gone ahead. I conclude that the probability is that the Plaintiff entered the water before Mr McAleer reached the forecourt and while he was on the pathway leading to it. During that period Mr McAleer's view of the forecourt and jetty would have been restricted.

[8] The Plaintiff's case was advanced by Mr Cahill QC on two bases. Firstly he contended that the Defendant was in breach of the common duty of care imposed by the Occupiers Liability Act (Northern Ireland) 1957 and secondly he contended that the Defendant owed the Plaintiff a special duty of care arising out of its supervisory responsibilities in respect of the course.

[9] The duty imposed upon the defendant as occupier of the facility is found in s.2(2) of the 1957 Act which provides:

> "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."

The nature of the obligation imposed was most recently considered by the House of Lords in Tomlinson v Congleton BC [2003] UKHL 47. That was a case where the Plaintiff had waded into water in a lake. He threw himself forward to dive not knowing the depth. He hit his head on the bottom and broke his neck. The House rejected his claim. The leading judgment was given by Lord Hoffmann who said 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 hang 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 that 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, as the council did by prohibiting swimming. But the law does not require him to do so"

[10] In my view the risks of diving from this jetty into a lake the depth of which was unknown to the Plaintiff were obvious and inherent in the activity which the Plaintiff decided to carry out. I see no reason to treat this as one of those rare cases where liability for such conduct should be imposed as a result of the state of the premises.

[11] The existence of a special duty of care can arise in a number of ways. It is commonly found in an employment relationship or because of an assumption of responsibility to a vulnerable group such as minors. It is now

clear that foreseeability alone is not sufficient to establish the existence of such a duty. In Caparo Industries v Dickman [1990] 2 AC 831 Lord Bridge asserted that it was necessary to establish a relationship characterised as one of proximity or neighbourhood and that the situation should be one in which it is fair, just and reasonable to impose a duty. Lord Roskill cautioned, however, that one had to be careful to examine each case on its particular facts and that the decision in each case is pragmatic.

[12] I consider that it is not appropriate to impose a duty of care in this case. Firstly the activity in which the group was engaged was entirely voluntary. It is, therefore, quite different from the case of an employee required to carry out a task or a course member required to complete an exercise.

[13] Secondly the activity was recreational and social in character. Such activities are less likely to give rise to a duty than those associated with work or business.

[14] Thirdly the Plaintiff's case essentially resolved to a failure to advise and a failure to warn. The nature of the duty which the Plaintiff seeks to impose can be characterised as an omission to take action. Such obligations are more difficult to sustain.

[15] Fourthly the risks associated with the activity in my view should have been obvious to a person of the Plaintiff's age and the Plaintiff has accepted as much.

[16] Accordingly I conclude that the Plaintiff's case must fail. Finally although I heard much evidence about what happened after the Plaintiff's dive I have not found it necessary or helpful to resolve all of those issues in order to determine this case.