Neutral Citation No. [2010] NIQB 37 | *Ref:* **GIL7799**

Judgment: approved by the Court for handing down | *Delivered:* **18/03/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

MAGELLA MARRON as parent and next friend of PAUL SHAUN MARRON

Plaintiff;

-and-

JOSEPH McKIVERIGAN

First-named defendant;

-and-

ROSE CHRISTINA McKIVERIGAN

Second-named defendant

GILLEN J

Cause of Action

[1] In this matter the plaintiff claims for personal injury, loss and damage sustained by him by reason of the negligence and breach of duty of the defendants and each of them in and about the occupation, management repair, safe keeping and inspection of premises at 25 Mill Street, Gilford, Co Down ("the location" or "the house").

Credibility

[2] Credibility was an important aspect of this case. I draw attention to what I said in Thornton v NIHE [2010] NIQB 4 at paragraph 13:

"In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following:

- The inherent probability or improbability of representations of facts.

- The presence of independent evidence tending to corroborate or undermine any given statement of fact.

- The presence of contemporaneous records.

- The demeanour of witnesses eg, does he equivocate in cross-examination.

- The frailty of the population at large and accurately recollecting and describing events in the distant past.

- Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication?

- Does the witness have a motive for misleading the court?

- Weigh up one witness against another."

I have invoked the criteria therein set out in the course of this case in deciding which witnesses I could believe.

Delay

[3] There has been inordinate delay in this case coming to trial. It is yet another example of where the delay in the hearing of this case—the accident itself had occurred in 1995 -- has not served the interests of justice well. It is crucial, particularly in cases where vulnerable persons or children are likely to be key witnesses, that such matters are case managed from an early stage and processed much more expeditiously.

The Plaintiff's case

[4] The plaintiff, whose date of birth is 17 October 1987, asserted that on 17 June 1995, he had been playing with some other children in the backyard of the premises at the location when it had started to rain. As he proceeded towards the back entrance of the location across what he described as paving stones, he tripped and struck his outstretched left arm on the wall of the house. It is accepted that the defendants jointly owned the house. The second-named defendant is the plaintiff's paternal aunt. She was divorced from the first defendant at that time and denied being in occupation of the premises at the relevant time .The other children playing at or present in the house were the cousins of the plaintiff.

[5] The plaintiff asserted he did not see the precise tripping point but was certain that his trip was caused by something protruding upwards. His recollection was that he fell forward with great force for a distance of about 2 metres. The passage of time

has obviously diluted his recollection of all details surrounding the incident and he recognised that it was possible that he was being pursued by his cousin, Kevin McKiverigan ("Kevin") immediately prior to his trip but he was clear that he was not running at the time.

[6] I pause to observe at this stage that I found this young man to be a thoroughly credible and convincing witness, who made no obvious attempt to exaggerate or dissemble. Instances of this were that he did not pretend that he had seen the tripping point before or after the accident, he did not deny possibilities that Kevin had been chasing him at the time and he readily conceded that his overall memory after the accident was blinded by the pain that he had suffered as a result of the fracture. His evidence was given in a measured manner, making appropriate concessions where I would have expected same to have been made.

[7] The engineer called on his behalf, Mr Sherry, had not visited the scene until 20 June 2007. His photographs before me depicted a radically altered area at the location. The back of the house is now covered with small paviours which where one foot square in dimension. It is common case that formerly the old-fashioned paving stones at the time of the accident were 2 feet square .

[8] It was Mr Sherry's evidence that if the tripping point was of the order of half inch/one inch protrusion, that would be a toe catching tripping point on a main traffic route to the house and was in a dangerous position. Such a hazard should have been repaired.

[9] The final witness called on behalf of the plaintiff was his father, John Marron. During the course of his evidence, Mr McEvoy, who appeared on behalf of the plaintiff, successfully persuaded me to allow him to treat Mr Marron as a hostile witness. I pause at this stage to deal with the legal principles which governed my determination.

Principles governing hostile witnesses

[10] The general rule is that a party is prohibited from impeaching his own witness by leading questions, asking him about previous inconsistent statements, cross-examining about past bad conduct or previous convictions .On the other hand a judge may allow a party to cross examine his own witness if that is necessary in the interests of justice .However a hostile witness must be distinguished from merely an unfavourable witness .The former is one who is not desirous of telling the truth at the instance of the party calling him and serious and otherwise inexplicable inconsistency, which amount merely to an omission, between a previous statement and the oral evidence may be sufficient to demonstrate it (R v Jobe [2004] EWCA 3155 and Pattenden (1992) 56 J Cr L 414)

[11] In deciding whether to allow the witness to be treated as hostile, the judge may have regard to the witness's demeanour, the terms of any inconsistent statement and the circumstances in which it was made. Cross & Tapper on Evidence, 11th Edition, at 333 states as follows:

> "But it is doubtful whether the mere existence of an inconsistency between a witness's previous statement and his testimony at the trial will necessarily lead the judge to allow the witness to be treated as hostile."

[12] I can see no reason to depart from that principle in a civil case. Consequently mere inconsistency would not be enough for a witness to be treated as hostile but the judge should have regard to the witness's demeanour, the terms of any inconsistent statement and the overall circumstances in which the statement was made.

[13] The relevant statutory provisions are as follows. Section 3 of the Criminal Procedure Act 1865 which governs a party's right to impeach the hostile witness in civil and criminal cases reads as follows:

> "A part producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony. But before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement."

[14] In Greenough v Eccles (1859) 5 CBNS 786 the court determined that 'adverse' means hostile. I observe that section 3 of the 1865 Act has not affected the common law according to which the judge has discretion to allow a hostile witness to be examined by means of leading questions or with reference to a previous statement.

[15] Article 7 of the Civil Evidence (NI) Order 1997, where relevant, provides as follows:

> "(2) A party who has called a person as a witness in civil proceedings, may not in those proceedings adduce evidence of a previous statement made by that person, except – (a) with the leave of the court; or (b) for the purpose of rebutting the suggestion that his evidence has been fabricated.

(3) Without prejudice to any provision made by rules of court by virtue of Article 4(1), where in the case of civil proceedings section 3, 4 or 5 of the Criminal Procedure Act 1865 applies, which make provision as to –

(a) how far a witness may be discredited by the party producing him, (b) the proof of contradictory statements made by a witness, and

(c) cross-examination as to previous statements in writing,

this does not authorise the adducing of evidence of a previous inconsistent or contradictory statement otherwise than in accordance with those sections.

(4) Where evidence of a previous statement is adduced as mentioned in paragraph (2) or (3), the statement shall be admissible as evidence of the matters stated."

Applying the principles to Mr Marron, Senior

[16] In his evidence I found the demeanour of Mr Marron to be unconvincing and evasive. Initially in his evidence in chief, he informed me that the first named defendant was his brother-in-law and that the second defendant was his sister to whose house he had gone with his son, the plaintiff, on the day of the accident. He asserted that after the accident had occurred, which he had not witnessed, he had taken his son to the hospital. Upon his return from the hospital he claimed that he had gone outside with his brother-in-law and saw a raised flagstone at he back of the house. He was not sure where it was albeit that it was somewhere to the left as depicted on photograph number 2. His evidence was that whilst in hospital his son told him that he had fallen in the centre of the yard and hit his hand against the wall

[17] In the course of his examination in chief he stated that he did not think it was right for his son to be making a claim against his sister and that he did not agree with what he was doing because his sister and brother-in-law could not afford to pay compensation.

[18] His demeanour whilst giving evidence was so evasive and unconvincing that I agreed to look at a statement Mr McEvoy claimed was inconsistent with his present evidence. That statement had been made on 7 March 2000 when he had attended at the plaintiff's solicitor's office. That statement, written by the solicitor relating what allegedly the witness had told him , included inter alia the following :

> "Before you left for the hospital you went out the back of Mr McKiverigan's house. He has the back area paved with flagstones (patio area). One of the children pointed out to you where the child had fallen. It was a raised flagstone – approximately half inch to one inch high. This is where the child tripped. He tripped on the flagstone and his arm struck an outside wall causing the severe injury. You know that Joseph McKiverigan owns the house at 25 Mill Street, Gilford. However, at the time he told you he had no house insurance to cover any claims of this nature".

[19] At first in his evidence Mr Marron denied any recollection of the visit to the solicitor's office or the statement itself. Upon being shown it his recollection recovered according to him and he did recall attending and making the statement. I simply did not believe this account and I was satisfied that he was dissembling in the course of his evidence. It was entirely disingenuous to now tell me that having seen the statement he did remember one of the children pointing out where the plaintiff had fallen particularly when he admitted that he had already been shown the statement by counsel and solicitor in the precincts of this court immediately before the hearing.

[20] Mr Gerard Cunningham, the solicitor retained by the plaintiff in Casey & Casey, gave evidence of the taking of the statement from Mr Marron and I believed him when he told me that he was satisfied that the witness had a good recollection of what had happened at the time when he discussed the matter with him. I accepted in its entirety Mr Cunningham's version of events

[21] I was, therefore, prepared to not only hold that the witness, Mr Marron senior, was a hostile witness motivated by a desire to protect his sister/brother-in-law from any claim, but that it was appropriate that I should admit as evidence the statement he had made to the solicitor, Mr Cunningham, on 7th March 2000, at a time when he was not motivated to dissemble. I found that this corroborated materially the case made by the plaintiff and established on the balance of probabilities the height of the defect over which he fell.

The defendants' case

[22] The defendants called in evidence, inter alios, Joseph McKiverigan, the first-named defendant and his son, Kevin McKiverigan, both of whom had been present at their home on the day the accident happened. I found both of these witnesses thoroughly unreliable, both in their demeanour and in the content of their evidence. I was of this view for the following reasons.

[23] In relation to Joseph McKiverigan, he claimed that subsequent to the occurrence of the accident and upon his return from the hospital , his son Kevin had shown him a location in an alleyway between his house and a shed where the accident had happened. This was obviously a completely different location from the scene of the accident as alleged by the plaintiff. It therefore was highly significant that this version of events was never put in cross-examination of the plaintiff by Mr Lavery who acted on behalf of the defendants. I was satisfied that it was appropriate to draw the inference that this version of events had been a late arrival into the defendants' case and I did not believe it.

[24] Mr Mc Kiverigan further testified that he knew nothing about this claim until the year 2004 when he received the writ. At the end of his evidence, however, he admitted that the plaintiff had informed him on the day of the accident that it was a raised kerb over which he had fallen and so I was satisfied that he knew from the very day of the accident the nature of the allegation that was being made. Further I did not believe that he was either unaware of the proceeding until 2004 or that he was unaware that he did not have any insurance cover until the claim had been instituted. The statement made by his brother, John Marron to Mr Cunningham on 7 March 2000 expressly referred to this witness having told Mr Marron that he had no house insurance to cover any claims of this nature. How would Mr Marron senior have known this if the question about the claim had not been discussed as early as 2000? Moreover, I was shown in evidence two letters from Casey & Casey, Solicitors, written to the first-named defendant, dated 20 May 1997 and 3 July 1997, both indicating that a claim was being instituted and that proceedings were to be issued. The first-named defendant denied that he had received such letters even though they had been clearly correctly addressed. I considered this to be inherently implausible since self-evidently he had made enquiries about insurance to cover the claim several years before the writ had been issued.

[25] The demeanour of Mr McKiverigan was shifty and evasive and smacked of a witness who was anxious to ensure that he would not end up paying any compensation in this case. I am satisfied that was the primary motive behind the inaccurate evidence that he put before me.

[26] Similarly I find Kevin McKiverigan thoroughly unsatisfactory. The evidence of this witness was that he had been playing with Shaun for about half-an-hour in various games, when, in the course of a game of tig, he had been running after the plaintiff along the side of the shed. The plaintiff allegedly turned into the alleyway between the shed and the house, stumbled, became entangled with his own legs, and fell forward putting his left arm outstretched.

[27] He alleged that after the accident had occurred, whilst his father was obtaining a mode of transport to take the plaintiff to the hospital, he had been in the back garden with Mr Marron senior, the plaintiff, and his sister who was aged nine. The witness asserted that they all may have been in the back garden "trying to work out where the plaintiff fell". He alleged that he voiced his opinion that the accident had

occurred in a quite different area, namely in the alleyway between the shed and the house as outlined by him in his evidence. He claimed he was unable to recall what it was that Mr Marron senior or the plaintiff had said when he voiced this opinion and in any event in the short time they were there they continued walking around the yard trying to work out where he had fallen. This seemed a thoroughly implausible assertion which he delivered in an evasive and hesitating manner. I regard it as highly significant that this assertion had never been put in cross-examination to the plaintiff or to Mr Marron senior. I have no doubt that experienced counsel would not have omitted to have done so had the matter been raised prior to the start of the trial.

[28] In addition, I found Kevin's description of the accident devoid of credibility. The photographs introduced by both engineers and the plan of the garden before me made it absolutely clear that the alleyway where he alleged the accident happened was at a sharp right-hand turn as one approached it . If he was behind the plaintiff pursuing him at the time the accident happened, I do not see how he could have seen the plaintiff fall forward onto his arm as he alleged. Moreover the momentum of the plaintiff, a heavy boy apparently, turning the corner would have thrown him against the right-hand wall rather than falling straight forward as alleged by his witness. The evidence of Mr Boyd the chartered engineer called on behalf of the defendant, lent weight to Mr McEvoy's assertion that such a scenario given the momentum of the turn was more likely.

Conclusions

Liability of the first named defendant

[29] It was common case that the first-named defendant was an owner and occupier of the accident location at the relevant time.

[30] I am satisfied that the first-named defendant owed a duty of care under the Occupiers' Liability Act (Northern Ireland) 1957 to take such care as was reasonable in all the circumstances to see that a child, such as the plaintiff, did not suffer injury on the premises by reason of any danger thereon. The plaintiff was, therefore, a lawful visitor to the premises. I accept that the half-inch/one inch protrusion of the slab was present and did cause the plaintiff to trip and that this constituted a danger to a child in circumstances where the first-named defendant should have been prepared for children to be less careful than adults. In so concluding I have taken into account the fact that

- the danger would not have been obvious to a child particularly one who was not a regular visitor to the premises ,
- it was located in an area immediately adjacent to the entrance to the house where a child obviously would be running or walking,
- the conduct expected of the child was that he would likely be playing and engaging in games at this location ,
- the plaintiff, at that stage, was a very young child

- the occupier, who had been responsible for laying these slabs, ought to have been aware of the danger. Since the first-named defendant had in fact laid these slabs, there would have been no difficulty or major expense in removing this danger

[31] I therefore consider that the first-named defendant was guilty of negligence and breach of the duty of care under the Occupiers' Liability Act (Northern Ireland) 1975.

The liability of the second defendant

[32] It was the unchallenged evidence of the first named defendant, corroborated by the evidence of the first-named defendant's current partner, Theresa Marron, the sister of the second-named defendant, that the first-named defendant and the second-named defendant had separated and divorced for several years at the time of the accident. The second-named defendant, who had primary custody of the children of the marriage, did continue to be on the title deeds of the house as a co owner with the first defendant. She was a visitor to the house at weekends to afford to the first named defendant access to the children. Her routine apparently was to leave the children at the house and then to depart before returning to collect them at a later hour.

[33] The question then arises as to whether the second-named defendant, although a joint owner of the house, was in law an occupier at the time of the accident. I am not satisfied that she was for the following reasons.

[34] First, an occupier is any person who is in actual occupation for time being or has possession or physical control, the degree of which need neither be entire nor exclusively hers, over the premises concerned.

[35] Two or more persons may be occupiers of the same premises at the same time and both may be under a duty of care to visitors (see Wheat v E. Lacon & Co Ltd [1966] AC 552). However, as Lord Morris of Borth-y-Gest asserted at page 586d:

> "It may … often be that the extent of the particular control which is exercised within this sphere of joint occupation will become a pointer as to the nature or extent of the duty which reasonably devolves upon a particular occupier".

Thus the nature and extent of the respective duties of even joint occupiers may be quite separate. The question of who is an occupier will depend on the particular facts of each case and especially upon the nature and extent of the occupation or control in fact enjoyed or exercised by the defendant over the premises (see Ashworth J in Creed v McGeoch & Sons Ltd [1955] 1 WLR 1005 at 1009).

[36] I consider that this second-named defendant was similar to the position of a landlord who has let premises by demise to a tenant and who is not regarded as a occupier since he is regarded as having parted with control, albeit he may owe duties qua landlord at common law.

[37] Since the second defendant in this case had not lived in the premises for several years prior to the accident, I do not consider that she was in occupation or control of those premises. Merely visiting the premises to leave the children off for access to their father did not constitute in law the requisite control of the premises If I am wrong about that, the nature and extent of the occupation or control which she enjoyed was so limited that in my opinion it did not make her an occupier responsible for the defect that existed in this instance at the time of the accident.

[38] I, therefore, dismiss the case against the second-named defendant. I shall invite counsel to address me on the question of costs in that regard.

Quantum

[39] The plaintiff sustained a greenstick fracture of the lower left ulna which was undisplaced. There was a compound fracture of the radius with complete separation of the shaft from the distal fragment. Treatment in Craigavon Area Hospital failed to reduce the fracture and therefore he was referred to Belfast. Under general anaesthetic further attempts were made to reduce this and he required an open reduction of the fractured distal radius. The fracture was reduced and held with cross-k wires which were introduced percutaneously. Thereafter the child required removal of the wire under anaesthetic on 31 July 1995 and was referred on for physiotherapy. He has been left with a scar on the back of his wrist which has somewhat thickened when I observed it .

[40] In substance this was a major injury to his wrist but it has now healed in excellent position and other than the scarring there is no reason to suggest he has made other than a complete and permanent recovery. I value this case at £16,000 together with the appropriate interest on the general damages.