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Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between

MATTHEW SAMUEL PHILLIPS (A MINOR)
BY SUSAN ISOBEL PHILLIPS (HIS MOTHER AND NEXT FRIEND)

Plaintiff

and

SOUTH EASTERN EDUCATION AND LIBRARY BOARD

Defendant

DEENY J

The facts

[1] The plaintiff in this action was born in January 1999 and is now 16. On 8 March 2010, when he was 11 years old, he was playing with some other boys on open ground adjacent to the Barbour Nursery School, Ashmount Gardens, Lisburn. One boy kicked the ball over the fence into the school grounds. It was the late afternoon and the school had closed. The plaintiff tried to climb over the fencing around the school. In the process of doing so he slipped and sustained a significant injury to his left hand. He now sues the defendant, the owner of the school, for damages for the personal injuries he sustained.

[2] The parties have agreed general damages in the sum of £40,000, there being no special damages.

[3] The plaintiff gave evidence at the trial. He was a commendably candid young man. He said there was a sign now on the school gates saying "No ball games" and another similar sign. He had never attempted to climb the fence before his accident but he had seen two girls doing so on one previous occasion. He was asked in examination in chief whether he thought it would be dangerous to do what he did in

advance. He said that looking up he did not think it would cause him so much harm. He adopted plaintiff's counsel's use of the word "spike" as to what caused him his injury. I shall return to that in due course.

[4] In cross-examination he said the fence had been there for all of his life. He acknowledged that once the ball went over he and others had the choice of waiting until the morning to retrieve it or climbing over the fence. He knew there was some risk in climbing over the fence. He realised that this was not permitted and it was wrong to do so. If his parents had been there he accepted that they would have told him to get off. He accepted there was a danger or risk attached. He was asked did he appreciate that he was trespassing and he said that it was not his intention but yes. He accepted that there was a problem with break-ins at schools so the fence was needed.

[5] The plaintiffs then called Mr Laurence McGill, consulting engineer. Both he and the defendant's engineer had taken photographs which were before the court. This was a fence made out of vertical wires amounting to 2.17 metres in height (7′ 3″). There was a 2 inch gap between each vertical wire and an 8 inch gap between each horizontal wire. The wires themselves were 5 millimetres in diameter. Rather than having substantial cross members the design of fence involved a bend in the wires at different intervals to give structural rigidity.

[6] Mr Magill said that the fence was fully compliant with British Standard 1722, Part 14, 2001 as an open mesh steel panel fence. This particular fence was in the general category. In response to a question from the court he said that the standard allowed the diameter of the wire of the fence to vary from 3 to 6 millimetres. The 5 millimetre width here was, therefore, within the normal parameters, I observe.

[7] The plaintiff's contention was that what caused his injury was one of the wires projecting above the top of the horizontal which they do indeed do to an extent of about 22 millimetres. The issue was whether it was a breach of duty to have a fence of that kind. Mr McGill was asked by counsel why would the wires protrude and he quoted that it was "to provide an increased security enhancement". On some of these fences the wires are cut off at the top horizontal wire. In the alternative some fences would allow for a more obvious deterrent such as barbed wire or rotating devices. While Mr McGill did not test the wire end he said that it did not look sharp or dangerous from the ground and so was not a deterrent. He showed pictures of palisade type fences as an alternative where the trident like tip of the fence was obviously sharp.

[8] In cross-examination he acknowledged that the wires had not been sharpened but merely cut. He would not describe them as a spike but as a wire end. His only point was whether or not the fence should have protrusions. He acknowledged that the defendant would have a number of fences of this kind some with protruding wires but would also have palisade fences. He acknowledged that vandalism of schools was a problem. He acknowledged that a scroll of barbed wire on the top of a

fence at a crèche could cause it to look "stalag-like" i.e. like a prisoner of war camp. His only point was that the protuberances of the wire ends did not look dangerous from the ground.

[9] There was no application by the defendant at the conclusion of the plaintiff's case. Instead the defendant called Mr Trevor Wright, another well-known and experienced consulting engineer. He had a photograph, photograph No. 5, which showed his hand against the wire ends on one of which the boy had hurt himself. He pointed out that it was not rough but he believed it had been buffed before painting. The photograph would appear to bear out that opinion. He thought it would need quite a bit of pressure, such as the body weight of the boy, to break the skin. His evidence was that you could not describe it as a "spike" and that it was compliant with the British Standard. The fencing was soft on the eye but a reasonable deterrent. A palisade fence was more common but this was probably a safer fence. He could not see how the protruding wires were a trap as their presence was obvious to anyone able to climb the fence.

[10] Counsel for the plaintiff put to him a document issued by NK Fencing, the manufacturer of the fence. He agreed that on their photograph the wire ends were not buffed but did look sharp but pointed out that that was not the appearance on his photograph No. 5 of the actual fence where the boy fell. The actual fence was safer than the one shown on the NK Fencing document. He had never seen a warning sign not to climb a fence before.

[11] In answer to a question from the court, there being no re-examination, he said it would have been possible to cut one's hand even if the wire ends had been level with the horizontal wire (as they were proud of the horizontal wires).

[12] The defendant called Mrs Tracey Cassells, who has been the Principal of the Barbour Nursery School for 10 years. It was built in 1995. She was never aware of any problem with the fencing nor of children climbing it. She had consulted the previous principal of the school and that lady had also been unaware of such an occasion. I accept that hearsay evidence is made in good faith and place an appropriate degree of weight upon it. She said the school was not told of the incident involving Master Phillips and only learnt of it from a solicitor's letter some 6 months later. No one ever spoke to her.

[13] A sign had gone up on the gates saying no ball games in or about June 2010 but that was because an elderly neighbour had complained of noise from a ball being kicked against the fence and which might damage the paint on the fence and was not put up because of this accident. Mrs Cassells was not cross-examined.

Consideration

[14] In considering whether the defendant is in breach of a duty of care owed to the plaintiff I must first consider whether the plaintiff was a lawful visitor to the

fence erected by the defendant. While counsel for the plaintiff demurred at the description of his client as a trespasser it is hard to see how that is not an appropriate description.

> "The term trespasser is a comprehensive word; it covers the wicked and the innocent; the burglar, the arrogant invader of another's land, the walker blithely unaware that he is stepping where he has no right to walk, or the wandering child – all may be dubbed as trespassers." Per Lord Morris of Borth-y-Gest in British Railways Board v Hetherington [1972] AC at 877 at 904.

In this case we have a "wandering child". It is manifestly clear that he was not a lawful visitor to the premises. The fence was there to keep him and others out. He had not sought permission to enter. The clear and only evidence before me was that there was not a practice of children climbing this fence, whether to retrieve balls or otherwise. In any event the 1987 Order uses language which covers persons whether they are strictly speaking trespassers or not. For completeness, I reject counsel for the plaintiff's argument that the plaintiff was not a trespasser because he had not entered the premises. He was attempting to do so and by climbing the fence had begun to trespass. He could not have been injured unless part of his body was on top of this fence. That was the commencement of a trespass by him. It is indisputable that he was neither a visitor to the premises nor a licensee of the defendant. The Statement of Claim correctly pleaded the 1987 Order and not the Occupiers Liability Act (NI) 1957.

[15] I therefore turn to the Occupiers' Liability (Northern Ireland) Order 1987:

> "**Duty of occupier to person other than his visitors**
>
> 3.—(1) The rules enacted by this Article shall have effect, in place of the rules of the common law, to determine—
>
> (a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and
>
> (b) if so, what that duty is.
>
> (2) For the purposes of this Article, the persons who are to be treated respectively as an occupier of

any premises (which, for those purposes, include any fixed or movable structure) and as his visitors are—

(a) any person who owes in relation to the premises the duty referred to in section 2 of the Occupiers' Liability Act (Northern Ireland) [1957 c. 25 (N.I.)] 1957 (the common duty of care), and

(b) those who are his visitors for the purposes of that duty.

(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in paragraph (1) if—

(a) he is aware of the danger or has reasonable grounds to believe that it exists;

(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and

(c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

(4) Where, by virtue of this Article, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.

(5) Any duty owed by virtue of this Article in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.

(6) No duty is owed by virtue of this Article to any person in respect of risks willingly accepted as his by

that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(7) No duty is owed by virtue of this Article to persons using a road and this Article does not affect any duty owed to such persons.

(8) Where a person owes a duty by virtue of this Article, he does not, by reason of any breach of the duty, incur any liability in respect of any loss of or damage to property.

(9) In this Article—

'road' means—

(a) a road as defined in Article 2(2) of the Roads (Northern Ireland) Order 1993, and

(b) any other road or way over which there exists a public right of way;

'injury' means anything resulting in death or personal injury, including any disease and any impairment of physical or mental condition; and

'movable structure' includes any vessel, vehicle or aircraft."

[16] One notes therefore that the first step which the courts should address is "whether any duty of care is owed by a person as occupier of premises to persons other than his visitors". If one reads together, as one should, Article 3(1) (a) and Article 3(3) (a) one can see that "the danger" in the latter paragraph is a danger "due to the state of the premises or to things done or omitted to be done on them". The meaning of this was considered by the House of Lords, per Lord Hoffmann, in Tomlinson v Congleton Borough Council [2004] 1 AC 46. Their Lordships were dealing there with a young man who had suffered a tetraplegic injury as a result of diving into shallow water in a lake in a park owned by the defendant Council. Lord Hoffman rejected the conclusion of the Court of Appeal in England that the water was "a siren call strong enough to turn stout men's minds". He deals with this, robustly if I may respectfully say so, at paragraph [28] of his judgment. He takes the view taken by the judge at first instance that there was nothing more dangerous about the mere at the location than any other stretch of open water in England. What of this fence? The fence complies with the relevant British Standard 1774. It is

commonly used in this and other jurisdictions. Contrary to the opening of the action I find that the wire ends on which the boy was unlucky enough to suffer an injury did not constitute "very very sharp spikes". Nobody gave evidence that they did. The danger was that if you tried to climb them you might injure yourself to some degree. I find, on the evidence of Mr Wright and the photographic evidence, that the wire ends, not spikes, in this case had been buffed and painted which would have further reduced any risk of injury being sustained over and above the manufactured nature of the fence as shown on the manufacturer's document. Clearly the defendant had not done something to the premises or omitted to do something to them to constitute a danger. On the contrary it erected a fence to keep people out to protect its property as, consistent with its own legal duty, it was obliged to do. Was there something wrong with the "state of the premises"? The fence was in good repair. It was a product that complied with the relevant standard. It seems to me that if one erected a perfectly ordinary wall that had no spikes or glass upon it there would still be a danger if somebody attempted to climb over the wall and fell because either they were too young or too unfit to do so or could only do so with a ladder but omitted to have a ladder. Here there was a "risk of [the plaintiff] suffering injury" by attempting to climb over a seven foot high wire mesh fence but the presence of that fence did not amount to a " danger due to the state of the premises or to things done or omitted to be done on them". Those words and the Order in general, imply a measure of fault on the part of the occupier which I find entirely absent on these facts.

[17] For completeness, if a duty of care was considered to be owed by the defendant as a result of its choice of this particular wire mesh fence it is difficult to see how it could comply with Article 3(4) of the 1987 Order. It had chosen a fence which is perfectly legal and conforms to the relevant British standard. Having done so how could it "take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned"? No step was suggested in that regard, save a very faint suggestion about a kind of warning sign which might comply with Article 3(5). However there was no evidence to suggest that that was a necessary or a reasonable step i.e. to put up a sign saying do not climb on a fence. I find that to be not so much a counsel of perfection as verging on the absurd. The fact that plaintiff's counsel emphasised that it was the choice of the fence that he was complaining of as constituting a danger to the child which was not obvious to him is consistent with the view that having made that choice there is no more the occupier could have done to mitigate the effect of that choice. I find it to have been a reasonable choice for the occupier to have made.

[18] For completeness I should say that the statement of claim also pleaded particulars of negligence against the defendant alleging in particular:

> "(a) Causing and creating a trap for children playing in the area …"

As I have already quoted Article 3 of the 1987 Order expressly says:

> "3-(1) The rules enacted by this Article shall have effect, in place of the rules of the common law …"

There was ample authority, including Herrington v British Railways Board [1972] AC 877 for the proposition that the earlier Occupiers' Liability Act was in place of the common law rules. The same principle must apply to the Occupiers' Liability (NI) Order 1987 as it would to the Occupiers' Liability Act 1984 in the neighbouring jurisdiction. See Salmond and Heuston on The Law of Torts, 21st Edition, 11.10 and Clerk and Lindsell on Torts, 21st Edition, 12-61.

[19] In case it is concluded that I am wrong in that view I address the issue as to whether this was a trap for children playing in the area. There is a line of cases dealing with this issue going back to Cooke v Midland Great Western Railway of Ireland [1909] AC 299 where an insecurely closed turntable, no longer serving any practical purpose, and regularly used by the youth of the Navan district for their amusement, was held to be capable of giving rise to liability as a trap. In Doran v Department of the Environment for Northern Ireland [1993] NI 1 Carwell J cited with approval the "classic judgment in Latham v R Johnston and Nephew Limited [1913] 1 KB 398, to which courts have turned in virtually every case concerning child licensees, and notwithstanding the statutory modification of the common law his expression of the principles governing an occupiers' duty towards children bears repetition in extenso. He said (at 451-416):

> "Two other terms must be alluded to - a 'trap' and 'attraction' or 'allurement'. A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise, of an appearance of safety under circumstances cloaking a reality of danger. Owners and occupiers alike expose licensees and visitors to traps on their premises at their peril, but a trap is a relative term. In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation."

Applying that here I consider that it could not be said that the occupier was leading this 11 year old boy into temptation. It is clear that unlike Doran we are not talking about a child of 5 or 6 because they could not possibly climb the fence but a boy of more years like the plaintiff here. I see no element of concealment or cloaking of a danger on the part of the occupier here. A glance at the fence, even by a child, would should that the wire ends were projecting and a moment's consideration would tell him that coming down on those was likely to be painful or possibly injurious to whatever part of his body made the contact. The plaintiff himself, now

16, accepted that he knew there was some risk in climbing the fence. I accept that he, and no doubt most others, would not have foreseen this particular injury but the wire ends were obviously made of metal and sticking up and were obvious to a person at the foot of the fence. I therefore consider, having heard the witnesses and considered the photographic and other evidence, that the occupier here had neither caused nor created a trap for children playing in this area.

[20] Although not necessary for the conclusion the evidence in this case is quite different from that in Cooke i.e. there is no evidence of children being in the practice of climbing this fence in any event.

[21] For all these reasons I am satisfied that the plaintiff here, despite a genuine injury and his candid evidence, is not entitled to succeed in law. I find for the defendant.