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Judgment: approved by the Court for handing down | *Delivered:* **11/01/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

SEAN THORNTON A MINOR BY CARMEL THORNTON HIS MOTHER AND NEXT FRIEND

Plaintiff;

-and-

NORTHERN IRELAND HOUSING EXECUTIVE

Defendant.

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GILLEN J

[1] This action arises out of an accident that allegedly occurred about 3.45 pm on 9 April 2000 ("the accident date") at a block of flats in Dove Gardens, Derry ("the location") when the plaintiff, date of birth 25 September 1989 was then 10 years of age.

[2] It was the plaintiff's case that he was playing a game of tig with some friends named Doherty and Duddy when he ran up some stairs in the block of flats to a laundry area where he stopped to rest against a fence. A photograph, one of several, of the scene taken nine days after the accident by a professional photographer showed wooden slats on a fence.

[3] The plaintiff claimed there was at least one slat absent at the time of his accident. As he sat down against the other slats on the bottom of the fence, he heard a crash and fell backwards to the ground below.

[4] A friend, Mr Duddy, who had been present and had engaged in the game with him, alleged that he was on the landing below and he became

aware of something falling. When he looked out to the ground below he saw the plaintiff lying there.

[5] It is plaintiff's case that his mother was summoned to the area depicted in the photograph. The gate to the area where the plaintiff was lying was apparently locked. Accordingly steps were taken to force entry to where he lay. An ambulance was also summoned and he was taken to Altnagelvin Hospital.

[6] Medical evidence was given before me by Mr Thompson FRCS consultant orthopaedic surgeon from Altnagelvin Hospital and a report tendered from Mr Wallace FRCS, consultant orthopaedic surgeon on behalf of the defendant. It is common case that the plaintiff did sustain injuries to his right wrist and left ankle which appear to have resolved fairly quickly and a fracture to his lower back, the extent of which was a matter of dispute.

Delay

[7] The accident in this case occurred on 9 April 2000. The writ of summons was not issued until 18 May 2007, the statement of claim was served on 18 June 2007 and the pleadings closed in October 2007. Thereafter further delay ensued to the extent that on 13 March 2009 the solicitors on record for the defendant threatened to seek an order to dismiss the action for want of prosecution unless the action was set down for trial within 14 days.

[8] The case came on for trial on 16 December 2009.

[9] Delay has not served well the interests of justice in this matter. Not only has it depleted somewhat the possibilities of accurate recollection of this event but it has exacerbated the frailties of the population at large to recollect events in the distant past.

[10] The delay in this case is particularly unwelcome because of the involvement of a minor. The system of case management that now operates in the Queen's Bench Division, whereby every case involving a minor is reviewed at some point prior to trial, irrespective of whether or not the action has been set down, should contribute to the removal of such delays in the future. Nevertheless, this case illustrates the very high burden upon professional representatives to ensure that cases are not allowed to suffer needless delay particularly in cases like this where both the facts and the medical evidence are without complexity.

Credibility

[11] The essential issue in this case was one of credibility. If the plaintiff was correct that the impugned fence was in the state of disrepair alleged then

it was likely that the defendant would be liable. On the other hand the defendant did not accept that the accident had occurred as alleged and the credibility of the plaintiff and his witnesses was called in doubt.

[12] Credibility of a witness embraces not only the concept of his truthfulness i.e. whether the evidence of the witness is to be believed but also the objective reliability of the witness i.e. his ability to observe or remember facts and events about which the witness is giving evidence.

[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 fact ,
- The presence of independent evidence tending to corroborate or undermine any given statement of fact,
- The presence of contemporaneous records,
- The demeanour of witnesses e.g. does he equivocate in cross examination,
- The frailty of the population at large in 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.

The Plaintiff's case

[14] I found the plaintiff in this case lacking in credibility in a number of areas. First, on his medical evidence. The plaintiff had sustained, inter alia, a wedge fracture of L4 vertebrae. An MRI scan of recent provenance revealed no abnormality in his back however. Mr Thompson FRCS, the orthopaedic consultant retained on his behalf, gave evidence and tendered two reports dated 22 June 2009 and 6 October 2009. In these the plaintiff was complaining of a persisting pain which was allegedly becoming progressively worse according to the plaintiff.

[15] Mr Thompson said that whilst he has experience of patients who have suffered such an injury complaining of pain notwithstanding a clear MRI scan – because they may have sustained damage not observable on the scan – he had not encountered patients who complain of becoming progressively worse as was the case made in this instance.

[16] Therefore although Mr Thompson thought it unlikely that the plaintiff should have continuing back pain after this period, he acknowledged the possibility that it might be so. However he did not accept from his experience that the pain should be becoming progressively worse as alleged by the

plaintiff. That evidence made me doubt in the first instance the plaintiff's credibility.

[17] The plaintiff had also told Mr Thompson that his back had been so poor that he had been unable to return to any sporting activities. However his medical records reveal a report of 27 January 2008 recording him attending for medical attention when he had been elbowed "playing football". The plaintiff in his evidence sought to meet this by suggesting that this had been an unorganised kick about in the street and not the organised sporting activities to which he had been referring. I considered this assertion to be disingenuous and an attempt to mislead me.

[18] It had to be borne in mind that the medical records of this young man showed that within one week of his injury he was displaying a full range of movement without discomfort. By 4 August 2000 he was recorded as "running about without any complaints". A report from Mr Price on behalf of the plaintiff noted him being asymptomatic after 3½ months although the author had added "it is possible to get some ache and discomfort in the region long term". I do not believe this coincides with the plaintiff's allegation of persisting and unremitting pain which is increasing in severity since the accident occurred.

[19] It was interesting to note that in light of the MRI scan, Mr Lyttle QC, who appeared on behalf of the plaintiff, indicated that the claim for loss of earnings set out in the amended statement of claim of August 2009 had been abandoned in a notice for particulars of more recent vintage. This was all notwithstanding the plaintiff continuing to tell me that he had had to leave work on a building site as a security man after three months in August 2008 and more recently from work in a call centre because of his painful back. GP notes introduced by Mr Lyttle QC in re-examination of the plaintiff revealed him complaining of episodes of pain but these were perhaps associated with a urinary tract infection. The plaintiff had made no such reference to me.

[20] Finally in this medical context, the plaintiff asserted that he had told Mr Thompson and Mr Wallace FRCS that he had good days and bad days with his back. Neither expert had made any record of this. Once again I did not believe the plaintiff because it seems inherently implausible to me that neither of these experienced consultants would have failed to note or record this salient fact whereas, on the contrary, they both noted that the plaintiff told them that his pain was becoming progressively worse. I believe he made this up in the witness box because he was confronted with a medical report indicating that he had been able to play football on occasions and sought refuge in the concept of "good days bad days ".

[21] The inherent improbabilities in the plaintiff's evidence did not end with his back complaints. The medical records put before me, which were

unchallenged, from the Ambulance Service reported, inter alia, that the plaintiff had fallen 60 feet. This was also the version of events given to Mr Wallace FRCS who examined him very recently in 2009.

[22] Self-evidently, the plaintiff did not fall 60 feet. The independent evidence of the photograph of the scene and his own evidence in chief revealed that in fact it was about 14 feet that he had fallen. The plaintiff, again I believe disingenuously, told me that because of the ambulance report he still believed that he had fallen 60 feet until the day of the hearing when counsel had pointed out that this could not be so given the photographic position of the impugned fence. I found this explanation implausible. He is now an adult, and he was well aware of where he fell from if he is telling the truth. He lived in these flats for some time and knew the area well. How could he have thought that it was a distance of 60 feet?

[23] This explanation for this discrepancy could well lie in the fact that when his mother gave evidence, she said that upon being summoned to the scene of the accident by the plaintiff's friend Mr Duddy, he had told her that her son had fallen from the top of the flats. It seemed to me that this was a plausible explanation for the advent of the suggestion that he had fallen 60 feet albeit the top of the flats, though clearly higher than the spot from where he now says he fell, was clearly not even this height.

[23] Interestingly the letter of claim alleged that "he fell from the top of flats". Again the plaintiff could not account for this as he said that he was definitely sitting on the beam against the fence on the second floor. This letter of course had a resonance with what with plaintiff's mother said his friend had told him at the time.

[24] As I shall shortly relate Mr Duddy's evidence to me did not bear this out. He said that he remembered where there was a gap in the fence as alleged by the plaintiff and decided this was where he had fallen from. If so why did he tell the plaintiff's mother that the plaintiff had fallen from "the top of the flats"?

[25] Further discrepancies emerged in the case. According to Mr Thompson, the plaintiff told him that he had been sitting on top of the fence before he fell. The plaintiff now denies having said that to Mr Thompson claiming that he could not sit on top of the fence and that he had definitely told Mr Thompson he was leaning against it. I regard Mr Thompson as being a careful consultant and I am satisfied that he would have faithfully recorded the history given to him.

[26] The ambulance report also records that the plaintiff had fallen from some scaffolding some four storeys up. At the time of admission to hospital the plaintiff was recorded as being alert and his mother present with him when this history was taken. The plaintiff could give no explanation as to where this reference to scaffolding came from.

[27] A plaintiff can be cross-examined on credibility on relevant issues. He can be questioned to show that he is dishonest by asking about instances where he has lied or contradicted himself in the past. In this case the plaintiff was cross-examined about various incidents in the past where he had received injuries and reported to the Accident and Emergency Department/GP at various times. On 2 December 2005 an entry in his medical records noted that at 3.38 am he had gone to hospital after someone had hit him with a plank. His account of this was that he was out at that time of the morning because he could not sleep and after visiting a shop someone unknown had hit him with a plank. He was unaware of any other details. On 12 July 2006 hospital records at 1.29 am noted that he attended having been assaulted. This time he said he had been standing outside a bar watching some rioting between Nationalist and Loyalists groups when he was hit by a stone. He had no idea who had been involved. On 15 July 2000 he reported to the hospital on the basis that someone had punched him in the face when he was simply standing alone. Again he denied that he had been fighting. On 9 March 2006 he reported to the A&E Department at 9.40 pm where he admitted fighting with a friend having gotten bitten on the shoulder. On 11 June 2006 at 0.40 am he again reported to the A&E Department. He alleged on this occasion he had been injured when he had been standing beside a youth club and a gang of youths had struck him with a crow bar without him being involved or having any other explanation. I found his explanations of these events singularly lacking in credibility or frankness.

[28] I add at this point that I watched the plaintiff carefully in the witness box and his demeanour when giving evidence about these matters betrayed a lack of candour.

[29] The plaintiff called one of his friends Mr Duddy to give evidence .I found Mr Duddy's evidence also lacking in credibility. He claimed that he had been 13 years of age at the time and had been playing with the plaintiff on the day the accident occurred. He had been running up one flight of stairs into the complex when he saw a flash and heard a scream. He went onto the first landing and observed the plaintiff below lying on the ground in pain. He then ran to summon help, informed the plaintiff's mother and took her to where he observed the boy had fallen. He then directed the ambulance to the scene. When asked if he had seen anything immediately after the accident he said "From what I remember there was a gap. I am guessing a huge gap I saw. I can't recollect how many slats missing." He said he remembered the

gap being present for about one week before it was repaired. Mr Duddy noticed this when he had been visiting a friend. He had associated the gap with the accident because it was the only reason why he could have seen his friend having fallen. He described the defect in the fence as being two planks broken half way up. He thought he remembered seeing the broken planks on the ground.

[30] Curiously however, according to the plaintiff's mother, he told her that the plaintiff had fallen from the top of the flats. Why would he have said that if he was clear that he had fallen through this hole which was manifestly not at the top of the flats?

[31} Mr Duddy also said that he did not notice the hole on the day of the accident although he must have been almost immediately underneath it – only 14 feet up – when he attended the scene of the accident if what he is now saying is the truth.

[32] Moreover he visited the plaintiff in hospital but said that he did not mention to the plaintiff or her mother the hole because everyone in the community knew. I found that explanation inherently improbable .

[33] I add that I found the demeanour in the witness box of Mr Duddy to be evasive and it was not without significance that when he was cross-examined about his knowledge of the gap he became extremely uncomfortable. In short his evidence did not smack of someone who was being candid with the court.

[34] The plaintiff also called in evidence a consultant engineer Mr Vincent McBride. He was not engaged until May 2009, some nine years after the accident and therefore the assistance he could provide was very limited. He did say that the material in this fence did require to be maintained on a regular basis. The fencing itself, provided it was maintained, was suitable for its purpose. It was his view that there should have been inspection on a regular basis because the structure was vulnerable to the elements. Perusing the photograph taken 9 days after the accident he observed that whilst there was no gap where the plaintiff now says he fell (it is the plaintiff's case that it had been repaired by then) he did point out a hole in a nearby stretch of fence for which there was no record of subsequent repair.

[35] The lack of credibility on the part of the plaintiff and his non professional witnesses would have been sufficient to persuade me to dismiss this case. Any lingering doubts that I might have had were displaced when the defendant called in evidence the District Maintenance Manager of Waterloo Place, Mr Meehan. I found this witness honest and forthright. He described how there was a full-time caretaker based in Dove Gardens which was a complex of 60 flats. That caretaker, Eddie Breslin, had, amongst his

duties, the obligation to report any defect. Record cards for the complex did not reveal any repair whatsoever to the impugned fence at the location alleged since the accident and certainly not within 9 days of the accident.

[36] The system for repairs was that the caretaker would report to the Maintenance Department any defect. That defect would then be placed on a computer. The maintenance officer would decide what work had to be done and would then raise a job to an independent builder who would obtain a work order and then carry out the work. The job number is a work order with a monetary value. The builder would do the work, and once it had been properly completed, the maintenance officer would then raise a payment to the builder. In other words the system operates on the basis of the report of a defect, a job order to the builder, and an invoice. No payment would be made until the maintenance officer had checked the work. The builder would not get paid unless these procedures were followed. Payment of such public money would inevitably be recorded. I believe this to be a satisfactory system of repair and maintenance.

[37] Pressed in cross-examination by Mr Lyttle QC, Mr Meehan indicated that Mr Breslin had not attended court because he was attending to a potential fatality in his family.

[38] Mr Meehan adamantly asserted that the defendant did not employ any direct labour at that time west of the Bann for carrying out such repairs. Any work carried out to this fence by way of repair would have been performed by an independent contractor and paid through the normal system.

[39] I found it inconceivable that this work would have been carried out within nine days of the accident and subsequently paid for without there being some record of payment. This was not an internal task but rather one performed by an independent contractor. I believe therefore that there was no repair carried out to this fence because there was no defect as alleged and that the lack of credibility on the part of the plaintiff is matched by the absence of any record indicating that any repair had been carried out.

[40] Mr Lyttle cross-examined this witness on the basis that the photograph, taken nine days after the accident, seemed to reveal a hole in a defective board which did not surface in any repair record. Once again time worked against the strength of this point. The photograph itself made for difficult viewing of such a hole and as Mr Meehan said, it might well be that this was a hole which did not require repairs. Mr Meehan said that he has seen" hundreds of holes like this" and they do not require repair unless the whole bottom section is damaged. It is for the maintenance officer to exercise his discretion in such instances. I accept this evidence

[41] I therefore have come to the conclusion that the plaintiff has failed to satisfy me on the balance of probabilities that this accident happened as alleged by him and I therefore dismiss the case.