**Neutral Citation No. [2009] NICA 18** | *Ref:* **COG7438**

*Judgment: approved by the Court for handing down* | *Delivered:* **13/03/09**
*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**BETWEEN:**

**AVEEN McDAID**

**Plaintiff/Appellant;**

**-and-**

**ROBERTA SNODGRASS**

**Defendant/Respondent.**

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**Before Higgins LJ Girvan LJ and Coghlin LJ**

**COGHLIN LJ**

**[1]** This is an appeal from a judgment by Morgan J delivered on 2 September 2008 at the conclusion of which he dismissed the appellant's claim for damages. During the course of the trial and for the purposes of the appeal before this court the appellant was represented by Mr Bentley QC and Mr Alban Maginness while Mr Cush appeared on behalf of the defendant. The court wishes to acknowledge the assistance that it derived from the clear and succinct skeleton arguments and oral submission advanced by both sets of counsel.

**The factual background**

**[2]** On 22 November 1999 the plaintiff and her friend, X, decided to go for a shopping trip to a superstore in Derry. The store was within walking distance of the street upon which both the appellant and X lived. The appellant was accompanied by her 4 month old daughter who travelled in a buggy. X had brought her two children, her daughter who was 2 months old and also travelling in a buggy, and her son Y who was almost 3. As they were returning from the shopping trip Y ran up an embankment and then ran down at speed on to the public road where he was struck by a motor vehicle driven by the defendant. The appellant witnessed the collision and described how Y had

been thrown up into the air and slammed onto the road. Both ladies went to the assistance of the child who was then taken by his mother to hospital where he was treated for serious spinal injuries. The appellant, together with the assistance of a passer-by, took X's younger child home to her grandmother's house. The respondent did not dispute that she was guilty of negligence causing or contributing to the collision with the child.

**[3]** The appellant described how, not surprisingly, she had been upset and crying at home as a result of witnessing this tragic accident. She said that she could see the events recurring when she closed her eyes. Her mother provided her with some prescription tablets as well as herbal remedies in an attempt to reduce her upset and anxiety. Sadly, as a result of the collision the child was paralysed from the waist down and the appellant said that she continued to be upset and anxious when she saw the boy thereafter or when other people asked her about his condition.

**[4]** While she did not seek medical help immediately, the plaintiff did attend her general practitioner on 25 August 2000 when she was recorded as complaining of poor sleep, early morning awakening and night-time flashbacks of the events of the accident during the previous two weeks. During the course of giving evidence she denied that her symptoms had not developed until August 2000 and maintained that they had developed in May after she had left her parents' home and had more time to ruminate about the accident. The appellant was examined upon three occasions by Dr Harbinson, Consultant Psychiatrist, who concluded that she had suffered a depressive illness characterised by insomnia, flashbacks, loss of appetite and weight and depression of mood from which she had largely recovered some two years after the accident.

**The relevant legal principles**

**[5]** There was no real dispute between the parties as to the relevant authorities. It was accepted that the appellant had been a secondary party and that, as such, the liability of the defendant for causing her to sustain psychiatric damage fell to be determined in accordance with the principles set out in a number of familiar decisions including *McLaughlin v. O'Brien* [1983] 1 AC 410, *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 AC 310, *Paige v. Smyth* [1996] AC 155 and *Whyte and Others v. Chief Constable of South Yorkshire Police* [1999] 2 AC 455. These decisions confirm the need to take account of a number of specific factors with regard to foreseeability when determining liability for psychiatric damage.

**[6]** In *McLaughlin v. O'Brien* Lord Wilberforce, recognising that there was a need to place some limitation upon the extent of admissible claims for "shock," made the following observations at page 422A:

> "It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused. As regard the class of persons, the possible range is between the closest of family ties – of parent and child, or husband and wife – and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or the defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors such as proximity to the scene in time and place, and the nature of the accident."

**[7]** In *Alcock v. Chief Constable of South Yorkshire*, a case that arose out of the Hillsborough Stadium tragedy in which 95 people were killed and more than 400 others injured, Lord Ackner did not find it surprising that in this area of tort the reasonable foreseeability test was not given "a free rein" but had to be subjected to a degree of control. He referred to the remarks of Lord Wilberforce in *McLaughlin and O'Brien* noted above and went on to say, at page 403 F:

> "As regards claims by those in the close family relationships referred to by Lord Wilberforce, the justification for admitting such claims is the presumption, which I would accept as being rebuttable, that the love and affection normally associated with persons in those relationships is such that a defendant ought reasonably to contemplate that they may be so closely and directly affected by his conduct as to suffer shock resulting in psychiatric illness. While as a generalisation more remote relatives and, a fortiori, friends, can reasonably be expected not to suffer illness from the shock, there can well be relatives and friends whose relationship is so close and intimate that their love and affection for the victim is comparable to that of the

> normal parent, spouse or child of the victim and should for the purpose of this cause of action be so treated."

At page 404 E Lord Ackner went on to express the view that:

> "Whether the degree of love and affection in any given relationship, be it that of relative or friend, is such that the defendant, in the light of the plaintiff's proximity to the scene of the accident in time and space and its nature, should reasonably have foreseen the shock-induced psychiatric illness, has to be decided on a case by case basis."

In the same case Lord Jauncey, considering whether claims for damages for nervous shock should be restricted to parents and spouses or should be extended to other relatives and close friends and, if so, where, if at all the line should be drawn, referred to *McLaughlin and O'Brien* and said at page 422F:

> "I would respectfully agree with Lord Wilberforce that cases involving less close relatives should be very carefully scrutinised. That, however, is not to say that they must necessarily be excluded. The underlying logic of allowing claims of parents and spouses is that it can readily be foreseen by the tortfeasor that if they saw or were involved in the immediate aftermath of a serious accident or disaster they would, because of their close relationship of love and affection with the victim be likely to suffer nervous shock. There may, however, be others whose ties of relationship are as strong. I do not consider that it would be profitable to try and define who such others might be or to draw any dividing line between one degree of relationship and another. To draw such a line would necessarily be arbitrary and lacking in logic. In my view the proper approach is to examine each case on its own facts in order to see whether the claimant has established so close a relationship of love and affection to the victim as might reasonably be expected in the case of spouses or parents and children. If the claimant has so established and all other requirements of the claim are satisfied he or she will succeed since the shock to him or her will be within the reasonable contemplation of the tortfeasor. If such relationship is not established the claim will fail."

**The issue for determination and the submissions of the parties**

**[8]** Before this court, as before the court of first instance, the parties focused upon the factual question as to whether the evidence established that the appellant's relationship with the injured child had been sufficiently close and intimate to bring her within the necessary degree of proximity. In other words, in the absence of a close direct family relationship, had the appellant established a degree of love and affection comparable to that of the normal parent, spouse or child in accordance with the observations of Lords Ackner and Jauncey in *Alcock?* While we propose to deal with the appeal upon that basis, in doing so, we would not wish it to be thought that the other factors of proximity to the scene in time and place and the nature of the accident are not of importance when assessing this type of claim. Witnessing at first hand a serious accident to a child is always likely to be a potentially harrowing experience.

**[9]** On behalf of the appellant Mr Bentley submitted that the learned trial judge had misdirected himself in referring to the burden faced by an unrelated bystander, such as the appellant. He drew the attention of the court to the observation at paragraph [8] of the judgment when Morgan J said: "The policy hurdle is a substantial barrier to success in claims of this sort and is intended to limit significantly the range of claimants who can succeed." While he accepted that, according to the authorities, cases involving less close relatives required careful scrutiny, Mr Bentley submitted that, nevertheless, the burden still remained that of the balance of probabilities. Mr Bentley further argued that, even if there had been no misdirection, the conclusion of the learned trial judge on the basis of the evidence was "simply wrong". At paragraph 3 of his skeleton argument he helpfully cited a number of examples from the transcript of evidence that he contended provided support for the existence of ties of the necessary degree of love and affection between the appellant and the injured child.

**[10]** On behalf of the respondent Mr Cush reminded the court that there had been two issues for determination by the learned trial judge. These were –

*(i)* Had the appellant established ties of love and affection of the requisite strength?

*(ii)* Had the psychiatric condition sustained by the plaintiff been caused by witnessing the circumstances of the accident?

The learned trial judge had determined the former without making any observations or findings in relation to the latter. He also referred to a number of excerpts from the transcript which, in his submission, established that the relationship between the plaintiff and the injured child had not fallen within the type of close and intimate relationship said to be necessary Lords Ackner and Wilberforce.

**Discussion**

**[11]** In *Stewart v. Wright* [2006] NICA 25 this court recently considered the approach to be taken on an appeal from a decision on the facts by a judge sitting alone. In the course of delivering the judgment of the court Kerr LCJ drew attention to the following review of the relevant authorities in *Murray v. Royal County Down Golf Club* [2005] NICA 52:-

> "[11] On an appeal in an action tried by a judge sitting alone the burden of showing that the judge was wrong in his decision as to the facts lies on the appellant and if the Court of Appeal is not satisfied that he was wrong the appeal will be dismissed – *Savage v. Adam* [1895] W.N.(95)109(11). But the court's duty is to rehear the case and in order to do so properly it must consider the material that was before the trial judge and not shrink from overruling the judge's findings where it concludes that he was wrong – *Coghlan v. Cumberland* [1898] 1 Ch 704.'
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> [12] In *Lofthouse v. Leicester Corporation* [1948] 64 T.L.R 604 Goddard LCJ described the approach that an appellate court should take thus:-
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> > 'Although I do not intend to lay down anything which is necessarily exhaustive I would say that the court ought not to interfere where the question is a pure question of fact, and where the only matter for decision is whether the judge has come to a right conclusion on the facts, unless it can be shown clearly that he did not take all the circumstances and evidence into account, or that he has misapprehended certain of the evidence, or that he has drawn an inference which there is no evidence to support.'
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> [13] And in this jurisdiction Lord Lowry CJ outlined a similar approach in *Northern Ireland Railways v. Tweed* [1982] NIJB where he said:-

> '. . . While the jurisdiction of the Court of Appeal is unrestricted when hearing appeals from the decision of a judge sitting without a jury, the trial judge was in a better position to assess the credibility of the witnesses and his decision should not be disturbed if there was evidence to support it.'

He also considered that it was useful to refer to the words of Lord Hoffman in *Biogen v. Medeva plc* [1996] 38 BMLR 149, 165 where he said:-

> 'The need for appellate caution in reversing the judge's evaluation of the facts is based upon more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance),* of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax [Benmax v. Austin Motorcar Limited [1955] AC 370]* as authorising or requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved.'"

**[12]** In this case the ability of both parties to refer us to portions of the transcript which they contend support their respective cases persuades us that the evidence was not "all one way" as Mr Bentley submitted. In our view, a careful and balanced reading of this transcript indicates that the learned trial judge faced a difficult task. We acknowledge the perennial handicap suffered by appeal courts faced with the cold printed words of a transcript and deprived of experiencing the vital dynamic of a first instance adversarial hearing. The appellant does not appear to have been a particularly articulate or sophisticated

witness and we have formed the impression that the learned trial judge was concerned less she might not "do herself justice". We consider that is likely to have been at least part of the motivation for the learned trial judge questioning the appellant himself at the conclusion of her cross examination. We note that such a proposed course of action did not recommend itself to counsel for the respondent. The learned trial judge then proceeded to question the appellant further in a gentle and objective manner with a view to exploring the relationship between the appellant, her friend and the injured child. It is of course quite impossible for us to attempt to place ourselves completely in the shoes of the learned trial judge but we note that, at the conclusion of his questions, no further matters were raised by either counsel save that Mr Bentley informed him that, despite an earlier indication, he now intended to call a further witness, namely the appellant's mother. In response to this information the learned trial judge observed that:-

> "It seemed to me that something more might be coming."

**[13]** We have no difficulty in accepting Mr Bentley's submission that the evidence in this case did not give rise to questions of credibility as significant as those present in the cases of *Tweed or Stewart*. However, even when credibility is not a major issue, it is still important to recognise the advantages enjoyed by a trial judge in terms of assessing and weighing the evidence and the circumstances in which it is elicited. The learned trial judge in this case appears to have conducted the hearing in a meticulous, sympathetic and sensitive fashion and, after giving the matter careful consideration, we are unable to conclude that his decision was wrong.

**[14]** We reject the submission that the learned trial judge erred in his approach to the burden of proof. The passage that was the subject of criticism by Mr Bentley must be seen in the context of the judge making a comparison between foreseeability of psychiatric damage in the case of a person within the spouse, parent or child type of relationship and a secondary party in this type of case in which the relationship requires to be subjected to close scrutiny. Accordingly, the appeal will be dismissed