Neutral Citation no [2004] NICA 16 | *Ref:* **NICC4148**

Judgment: approved by the Court for handing down | *Delivered:* **14.05.04**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

DAMIEN JOHN SMYTH

Plaintiff/Appellant:

and

BRENDAN SMYTH

Defendant/Respondent:

Before: Nicholson LJ, Campbell LJ and Weatherup J

NICHOLSON LJ

Introduction

[1] This is an appeal from the judgment of Sheil J delivered on 11 March 2003.

The Primary Facts

[2] He made findings of fact that:

(a) on Sunday 18 August 1996 at approximately 5.00pm the appellant, then 12 years of age, met with an accident while playing basketball in the yard of his father's mushroom farm outside the city of Armagh;
(b) at approximately 5.00pm his mother's sister arrived at the yard with her two children, Neil then aged 9 and Jennifer then aged 12;
(c) the adults, namely the parents of the appellant and the mother of Neil and Jennifer went into the house while the appellant and his two cousins, Neil and Jennifer, started to play basketball in the yard. The basketball and basket had been given to the appellant as a birthday present from his parents in June 1996;

(d) the basket was fixed to a board on a wall in the yard, which can be seen in photograph 3 of the set of photographs taken by Mr Shields, Consulting Engineer, on 19 October 2000 at the time of a joint inspection with Mr Wright, a Consulting Engineer, retained on behalf of the respondent;

(e) the respondent's tractor together with the link box attached thereto was parked close to and parallel to the wall (as seen in photograph 3) by the appellant's older cousin Brendan, acting as agent for the respondent on that day;

(f) there were two pallets lying flat in the link box and a third pallet was sitting in its upright position but sloping against the wall, as can be seen from the photographs;

(g) after the game had been in progress for approximately 5-10 minutes the appellant was passed the ball by Neil or Jennifer and ran towards the wall in order to put the ball into the basket. He did so in one forward movement by running across the flat pallets in the link box and up the face of the sloping pallet. On reaching the top of the sloping pallet his right foot caught in the top of the pallet in the position marked on photograph 5 by the appellant, thereby causing him to fall backwards to the ground. The appellant stated that he had never done this before. There was no evidence that the tractor together with the link box attached thereto and the pallets had ever been parked close to and parallel to the wall, just to the right of the basket, as parked on the day of the accident.

[3] The appellant's credibility as to how the accident occurred was challenged on behalf of the respondent but the Judge held that the accident occurred as the appellant and his cousin, Neil Gallagher, described in evidence. The respondent did not give evidence but the appellant stated, without challenge, that he frequently played basketball in the yard in that location where his cousin, Brendan, who worked for his father, had fixed the basket to the wall.

The Judge's Decision

[4] The judge found that the pallets did not constitute an unusual danger or a trap for the appellant and that they did not constitute an allurement and gave judgment in favour of the respondent.

The Appeal

[5] The leading case in this jurisdiction on the test which this court should apply to a finding on primary facts is *Northern Ireland Railways Company Limited v Tweed & Another* (1982) NIJB No.15. At page 10 of the judgment Lord Lowry LCJ set out the principles which guide an appellate court in

hearing an appeal from the decision of a judge sitting without a jury. The relevant principle is:

> "2. The appellant court is in as good a position as the trial judge to draw inferences from documents and from facts which are clear but even here must give weight to his conclusions"….

[6] Counsel concentrated their submissions on whether the set-up described at [2] was an allurement which was the case rejected by the judge although he went further in his findings: see (4). This court raised the point that arguably children would trip on the pallets and sustain injury and counsel for the appellant adopted the point.

[7] In *Hughes v Lord Advocate* [1963] AC 837 it was concluded that the accident in question "was but a variant of the foreseeable" and it mattered not that it may have arisen in an unforeseeable manner. Lord Reid said at page 845:

> "But a defender is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable. This accident was caused by a known cause of danger but caused in a way which could not have been foreseen and…that affords no defence"…

Lord Pearce said that the accident was but a variant of the foreseeable. The dictum of Lord Macintosh in *Harvey v Singer Manufacturing Co Ltd* (1961) SC310 that "The precise concatenation of circumstances need not be envisaged" was approved.

[8] In *Jolley v Sutton London Borough Council* [2000] 1WLR 1082 the House of Lords held that it was reasonably foreseeable that children would meddle with an abandoned boat at the risk of personal injury and the defendant's duty was to protect them from such a risk. Provided that the injury suffered was within the scope of the duty as defined, it was not necessary that the precise mechanism by which injury arose should be foreseeable. As the learned authors of Charlesworth on Negligence (10th Ed at 2.09) state:-

> "The claimant's damage was, "but a variant of the foreseeable."

Lord Steyn pointed out in Jolley (at page 1089) that it was a sterile exercise to compare the facts of different cases in this corner of the law, save to identify

the relevant rule to apply to the facts as found. (See also the opinion of Lord Hoffman at p. 1092).

[9] If the point referred to at [6] and the authorities mentioned at [7] and [8] had been drawn to the judge's attention in the context of "a variant of the foreseeable" we are confident that the judge would have reached a different conclusion. It is true that the mother of the appellant saw no danger before going into the house because the children were not playing basketball at the time but it was reasonably foreseeable that they would. As the photographs show clearly, the risk of injury of the children playing close to the basket and, therefore, playing close to the pallets, was obvious. They were likely to be looking up towards the basket and not at the ground. They might trip and fall over the link box or pallets, they might run or step onto the pallets to be nearer the basket and slip. To climb onto the pallet nearest the basket was merely a "variant of the foreseeable." The tractor and the link box and the pallets should not have been parked so close to the basketball net. Accordingly, we consider that the respondent, who was liable for the acts of his agent who parked the tractor there was liable in negligence and under the Occupiers Liability Act (NI) 1957.

Contributory Negligence

[10] At the date of the accident the appellant was 12 years of age. We consider that the appellant was of an age which leads us to find contributory negligence to the extent of two-fifths. We reduce the agreed damages of £25,000.00 to £15,000.00 and award interest at 2% from the date of issue of the writ of summons until 11 March 2003 and at judgment rate from that date.

[11] Accordingly we allow the appeal.