Neutral Citation no. [2003[NIQB 19 | *Ref:* **SHEC3882**

Judgment: approved by the Court for handing down | *Delivered:* **11/03/03**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN

QUEEN'S BENCH DIVISION

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BETWEEN:

DAMIEN SMYTH

Plaintiff

and

BRENDAN SMYTH

Defendant

_____

SHEIL J

[1] The plaintiff in this action is now a 19 year old student at the New Ulster University. On Sunday 18 August 1996 at approximately 5.00pm he met with an accident while playing basketball in the yard of his father's mushroom farm outside the city of Armagh. The plaintiff was then aged 12 years.

[2] Earlier that day the plaintiff had been assisting his father with the mushrooms in one of the mushroom houses but the work had ceased for the day. At approximately 5.00pm his mother's sister, Mrs Gallagher, arrived with her two children, Neil then aged 9 and Jennifer then aged 12. On their arrival all the adults went into the house while the plaintiff together with his two cousins, Neil and Jennifer, started to play basketball in the yard. The plaintiff had received the basketball game from his parents as a birthday present in June 1996.

[3] The basketball net was fixed to a board on a wall in the yard, which board and wall are seen in photograph 3 of the set of 5 photographs taken by Mr Shields, consulting engineer retained on behalf of the plaintiff, on 19 October 2000 at the time of a joint inspection with Mr Wright, consulting engineer retained on behalf of the defendant. As can be seen from the photographs, which are a reconstruction of the scene, save that the actual net for the basketball is not in place on the board on the wall, the defendant's tractor together with the link box attached thereto was parked close to and parallel to the wall; there were 2 pallets lying flat in the link box and one

pallet sitting in it upright but sloping against the wall, as seen in the photographs.

[4] After the game had been in progress for approximately 5-10 minutes, the plaintiff was passed the ball by Neil or Jennifer, on receipt of which he ran towards the wall to put the ball into the net. 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. The plaintiff stated that he had never done this before. On reaching the top of the sloping pallet his right foot caught in the top of the pallet in the position marked with an X on photograph 5, thereby causing the plaintiff to fall backwards to the ground.

[5] While Mr Spence, counsel for the defendant, questioned the credibility of the plaintiff as to how the accident occurred, I am satisfied on the balance of probabilities that the accident did occur in the manner alleged by the plaintiff and by his cousin, Mr Neil Gallagher, who gave evidence on his behalf.

[6] Damages in this action were agreed in the sum £25,000.

[7] The defendant, who is the father of the plaintiff, was not called to give evidence. The plaintiff stated in evidence that since June 1996 he had often played basketball alone in the yard in that location and that his father was aware of that fact.

[8] The plaintiff claims damages against his father for alleged negligence and breach of Section 2 of the Occupiers Liability Act (Northern Ireland) 1957 which reads as follows:

> "Section 2
> (1) An occupier of premises owes the same duty, the `common duty of care', to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
>
> (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
>
> (3) The circumstances relevant for the present purpose include the degree of care, and of want of

> care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases –
>
> (a) An occupier must be prepared for children to be less careful than adults;
>
> (b) ----------."

In Phipps v Rochester Corporation [1955] 1 QB 450 at 458 Devlin J distinguished between big children and little children, that is "children who know what they are about and children who do not". As already stated the plaintiff at the time of this accident was aged 12 years.

[9] Mr Cahill QC, who appeared with Mr Mallon for the plaintiff, submitted that the pallet was an allurement for the plaintiff. In Latham v R Johnson & Nephew Limited [1913] 1 KB 398, a case cited in Charlesworth and Percy on Negligence, 10th Edition at paragraph 7-47, Hamilton LJ stated at 146:

> "What objects which attract infants to their hurt are traps even to them? Not all objects with which children hurt themselves simpliciter. A child can get into mischief and hurt itself with anything if it is young enough. In some cases the answer may rest with the jury, but it must be a matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal. No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight in a private close cannot so combine the properties of temptation and retribution as to be properly called a trap."

On the question of allurements, Charlesworth and Percy on Negligence, 10th Edition refer to the decision of Asquith in Sutton v Bootle Corporation [1947] KB 359 at 369. I also refer to the decision of the House of Lords in Jolley v Sutton London Borough Council [2000] 1 WLR 1082 at 1089 where Lord Steyn stated:

> "In this corner of the law the results of decided cases are in evitably very fact- sensitive. Both counsel nevertheless at times invited Your Lordships to compare the facts of the present case with the facts of other decided cases. That is a

> sterile exercise. Precedent is a valuable stabilising influence in our legal system. But, comparing the facts of and outcome of cases in this branch of the law is the misuse of the only proper use of precedent, viz, to identify the relevant rule to apply to the facts as found."

[10] Mrs Smyth, the plaintiff's mother and wife of the defendant, Brendan Smyth, gave evidence on behalf of the plaintiff; she had been a farmer's wife for over 20 years. In the course of her evidence she accepted that when her sister and her two children, Neil and Jennifer, arrived at the farm on that Sunday afternoon, she noticed the tractor and the link box together with the pallets parked against the wall but "passed no remarks on it". In the course of her cross-examination by Mr Spence, counsel for the defendant, she stated that she knew the risks to children living and playing on a farm and that if she had anticipated any danger from the tractor, link box or the pallets therein, she would have moved them or would have got her husband to do so.

[11] I do not consider that the pallets constituted an unusual danger or a trap for the plaintiff, who was then aged 12, or that they constituted an allurement. The plaintiff was all too familiar with pallets and their purpose, as there were always some about the yard in connection with the mushroom farming.

[12] Having heard the evidence in this case I do not consider that the plaintiff has established that the defendant was guilty of any negligence or breach of statutory duty under Section 2 of the Occupiers Liability Act (Northern Ireland) 1957.

[13] Accordingly I dismiss the plaintiff's claim.