Neutral Citation No. [2011] NIQB 58 | *Ref:* **GIL8177**

Judgment: approved by the Court for handing down | *Delivered:* **14/4/11**
*(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:

JOHN McKENNA

Plaintiff;

-and-

DUNMORE CONSTRUCTION LIMITED

Defendant.

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GILLEN J

Cause of Action

[1] In this matter the plaintiff claims that on 26 December 2004 he was walking across the public highway at Fruithill Park, Belfast when by reason of the negligence and nuisance of the defendant, Dunmore Construction Limited, he fell on debris namely a half sized breeze block which had emanated from a building site owned by the defendant (hereinafter called "the building site") adjacent to the public highway. He allegedly sustained a double fracture of his left ankle which counsel have helpfully agreed had a value of £15,000.

The plaintiff's case

[2] The plaintiff alleged that on the day in question, Boxing Day, he had gone to the Trinity Lodge public house on Monagh Road about 12.30 pm with his uncle and brother Martin. He specifically indicated that another of his brothers, Patrick, had not joined them at that stage because he did not get on well with the uncle.

[3] The plaintiff asserted he had four pints of Harp beer during the afternoon and remained in the pub until about 6.00 pm. At that stage his wife collected himself and Patrick to go the Glenowen Inn at the top of the Glen

Road where she deposited the two of them. The plaintiff and Patrick, without drinking there, shortly thereafter determined to go the Whiteford Inn which required them to walk along the Glen Road, Kennedy Way and into Fruithill Park past the building site on the way to the Andersonstown Road. In Fruithill Park he was crossing the road to the side of the building site and as he did so he stood on top of "a bit of a breeze block and slipped, falling to the ground". He saw other pieces of stone debris on the road.

[4] He realised his left ankle was injured and so telephoned his wife who collected himself and his brother Patrick and took them to the Royal Victoria Hospital. There the delay was such that his wife subsequently took him to the Mater Hospital for treatment.

[5] I pause to observe that in the course of his evidence before me the plaintiff marked with an "X" on photograph P1 taken at the scene some days after the accident where "he fell". This "X" was in fact on the edge of the footpath and not on the road. When this was drawn to his attention in cross examination he said the "X" was not where the accident happened but "near where it happened". Why he would have marked a spot near where it happened rather than deal with the precise request to mark where it actually happened was rather lost on me.

[6] The plaintiff called two witnesses on his behalf. First his brother Patrick McKenna whose evidence before me about the earlier part of the day i.e. that he had not joined the plaintiff until much later in the day because he did not get on well with his brother, was similar to that of the plaintiff. He claimed to have met up with the plaintiff about 5.45 pm.

[7] The problem that Patrick McKenna and the plaintiff faced was that Patrick McKenna had given a detailed statement to the insurance representative of the defendant on 16 February 2006 in which he had said the following inter alia:-

> "On Boxing Day I was walking with my brother along Fruithill Park. We were out for a couple of drinks together. We had gone out about 2 pm. We went to the Trinity Lodge in Turf Lodge. We left there at about 4.30 or 5 pm. We got a lift to Glen Road and decided to go into the Glenowen Bar on the Glen Road. We looked into the bar but decided it was too busy. We then walked down Kennedy Way for about 100 yards and then turned into Fruithill Park. This was about 5 pm. It was dark. I think it was frosty. Towards the bottom of Fruithill Park John fell to the ground. There were stones scattered on the ground both on the road and the footpath".

Later he said –

> "I don't think we walked any further. I got a taxi home and John and his wife went into the hospital. John's lower leg was badly swollen. I think he went to the Royal Victoria Hospital and the Mater. John and I had probably had about four or five pints on that day."

[8] This of course completely contradicted the plaintiff's case that his brother Patrick had not been with him until much later in the evening and in addition that he had accompanied the plaintiff and his wife to the Royal Victoria Hospital in the aftermath of the accident.

[9] Patrick McKenna subsequently on 16 February 2006 contacted the insurance representative to change his statement after he alleged he had been reminded by his wife that he had not in fact gone out with the plaintiff until about 5 pm. The allegedly corrected statement declared –

> "My wife has reminded me that in fact John and I did not go out that day until 5 pm. John's wife gave us a lift to the Trinity Bar at about 5 pm."

[10] In cross examination he recognised that even the corrected statement was incomplete in that the plaintiff's wife had not taken the two of them to the Trinity Bar but had simply brought him to the bar to meet the plaintiff.

[11] He accounted for his mistaken first statement on the basis that some 14 months after the accident he was mistakenly recalling what had usually happened in other years on Boxing Day and had forgotten that the particulars of this day were different.

[12] The final witness on behalf of the plaintiff was his wife who recalled taking Patrick to the Trinity Lodge at about 5.45 pm having initially left her husband and his two brothers and uncle there at about 12.30. She recalled then dropping the plaintiff and Patrick off at the Glenowen Bar before being subsequently telephoned by her husband who related that an accident had occurred at Fruithill Park. She then collected them from Fruithill Park and drove them to the Royal Victoria Hospital. Her account, contrary to that of Patrick in his original statement to the insurers, was that she drove Patrick home from the Royal Victoria Hospital and returned to her husband subsequently taking him to Mater.

The defendant's case

[13] The defendant called two witnesses. First Mr Ward told me that he had been a night watchman for the defendant between 3 pm and 10 pm on 26 December 2004. He had parked his car beside the gateway entrance to the site and remained there throughout this period. He said that if he had seen any bits of breeze block or stone on the road he would have thrown them back on to the site to ensure that no one threw them at the site buildings. He was sure there were not any there on this occasion and in fact he had never experienced any problems of this kind during his employment as a watchman between November 2004 and January 2005. His evidence also was that he had not seen any accident occur on Fruithill Park or anyone falling during his time there on 26 December 2004 between 3 pm and 10 pm. This obviously contradicted the plaintiff's story.

[14] However he had made a statement on 28 March 2005 to the insurers in the following terms –

> "I am engaged by Dunmore Construction as a night watchman at their site in Fruithill Park, Andersonstown. I sit in my car directly outside the site just below No 1 Fruithill Park from 6 pm until 2 am. I have a clear sight of the site boundary footpath and roadway. On the evening of 26 December 2004 I did not see a broken breeze block lying on the road or footpath adjacent to the site nor did I witness anyone falling to the ground despite the areas being clearly lit my street lighting."

[15] No reference was made to the Boxing Day hours which allegedly had been 3 pm to 10 pm in that statement.

[16] The second defence witness was Eamon Rodgers, the defendant's site manager. He described a system of cleaning up and inspection by the defendants after lorries left the site to remove any gravel deposited on the footpath or road. He also indicated the site had been closed for Christmas between 21 December 2004 and early January 2005 and that after finishing on 21 December 2004 at about 4.30 he had checked the road and footpath to ensure they were clean and tidy. He said he employed Mr Ward between November 2004 and July 2005 as a watchman. There was no written contract of employment or wages paid to Mr Ward save that Mr Ward was afforded the use of Mr Rodgers' mobile holiday home for 3 weeks in the summer before and after the relevant period.

Conclusion

[17] The onus in this matter is on the plaintiff to satisfy me on the balance of probabilities that his version is correct. This case was purely a factual matter because I determined that had the plaintiff fallen as described by him I would have been satisfied that the defendant was liable for such debris being on the road.

[18] The essential issue in this case was therefore one of credibility. Did I believe the plaintiff's case on the balance of probabilities?

[19] I touched on some of the factors which a court takes into account in assessing credibility in an unreported judgment of my own in *Thornton v. NIHE* delivered on 11 January 2010 (GIL 7711). At paragraph 13 of that judgment I said –

> "[13] In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following:
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> - 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."

[20] I have come to the conclusion in this instance that the plaintiff has failed to satisfy me on the balance of probabilities that his version of events is truthful or correct. My reasons for so concluding are as follows.

[21] First, I do not believe the version of events given to me by his brother Patrick. I find it unbelievable that he should have given a detailed account of the events of the afternoon of 26 December 2004 to the insurance company in February 2006 if they did not occur as he described. This was not simply a

general recitation of what had happened in other years. Not only had he specified a particular time i.e. 2 pm that he had gone out with his brother but he had specified a time when they left the Trinity Lodge i.e. 4.30/5.00 and the nature of transport i.e. he got a lift to the Glen Road. This is completely contradictory to his case today that he had not been with his brother at all in the afternoon and had been taken to the Trinity Lodge by the plaintiff's wife at about 5 pm.

[22] The detail he gives of that day is striking. He even specifies the number of drinks that they had – "John and I had probably had about 4 or 5 pints only that day" – which of course tallies almost precisely with the plaintiff's account of 4 pints even though on Patrick's own story now he never had anything to drink with his brother in the Trinity Lodge or indeed anywhere else that day. It all smacks of an orchestrated and fabricated story.

[23] Equally telling was his unequivocal assertion, never corrected in his subsequent version to the insurance company, that he look a taxi from the scene whereas he told me, as did the plaintiff's wife, that he had accompanied the plaintiff and his wife to the Royal Victoria Hospital. Indeed his statement said "I think he went to the Royal Victoria Hospital and the Mater". Why would he say that if he actually had been to the Royal Victoria Hospital with him?

[24] This was a highly unusual day. An incident such as this had never happened before. The details of this day would have been etched on his memory even 15 months later when relating the account to the insurance company. I do not believe him when he claims to have forgotten the details so soon afterwards.

[25] I also found his account of his change of story implausible. Why would he have been going over in detail with his wife what had happened in his meeting with the insurance company?Why would she remember the minutiae of that day more than him?

[26] I also found suspicious the differing accounts of the plaintiff and his brother as to the alleged distribution of debris. In the first place, I had no doubt that in his evidence in chief the plaintiff had intended to mark the "X" on photograph P1 where he had fallen i.e. at the footpath. Only when it was drawn to his attention that this contradicted his assertion that he fell on the road did he disingenuously assert that the "X" represented "near where he had fallen". Secondly, he contended he did not recall seeing stones on the footpath before or after the accident whereas Patrick said they were scattered across it. They also differed in their description of the size of the stones. These contradictions smack of witnesses simply getting their stories wrong.

[27] I pause to add that I did not find the demeanour of either of these witnesses impressive with Patrick McKenna in particular being evasive and unconvincing. I consider Mrs McKenna was simply doing the best for her husband but the contradictions with Patrick McKenna's account fatally undermined their whole story.

[28] On the other hand I believe that Mr Ward was doing his best to tell the truth. I accept that he was a watchman on the date. It seems to me inherently probable that a site such as this where apartments/town houses were being built and where, as Mr Rodgers said, at least one block was completely finished, would have a watchman at or near the entrance. Moreover whilst the normal night watchman hours would likely be 6 to 2 am I consider it inherently probable that during the holiday period when children and youths were off school or off work earlier hours would be invoked i.e. 3 pm to 10 pm. I believe Mr Ward probably was there and would have observed the events as described by the plaintiff had they happened in the way he relates.

[29] I also consider it inherently unlikely that there would have been stones and half breeze blocks strewn across this roadway/footpath between 21 December 2004 and 26 December 2004. Why would the watchman not have at least removed items such as a half breeze block in the road as he told me his duties would require? I also believed Mr Rodgers was probably correct when he told me there was a system for cleaning and tidying up the site before they left for the holiday period over Christmas. To have left such material all over the road and pathway would have been to invite attack upon these sites by youths and children walking by particularly during a holiday period when many would be in the vicinity. A cleaning/tidying up system seems to me to have been a necessity for preservation of the site apart altogether from protection of pedestrians and vehicular traffic.

[30] Accordingly, weighing up one witness against another, I have come to the conclusion that I must believe the defendant's case and I dismiss the plaintiff's case in the circumstances.