Neutral Citation No. [2011] NIQB 79 | *Ref:* **GIL8160**

Judgment: approved by the Court for handing down | *Delivered:* **15/04/11**
*(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:

GAVIN NOEL KELLY, a minor acting by BREDA KELLY his mother and next friend

Plaintiff;

-and-

ELIZABETH NUGENT

Defendant.

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GILLEN J

Cause of Action

[1] This action is a claim for negligence by the plaintiff, who was born on 24 December 1997, arising out a collision between himself when he was riding a tricycle along the Carrickrovaddy Road, Newtownhamilton, County Armagh ("the location") on 16 September 2007 and a vehicle driven by the defendant resulting in personal injuries to the plaintiff.

Background Facts

[2] The location was a narrow country road where there were approximately three houses grouped together but little else by way of housing for some distance along this road. The plaintiff's home had pillars at the entrance with a grass exterior leading to the road. An engineer called on behalf of the plaintiff, Mr Shields, helpfully described the dimensions of the tricycle and the varying width of the road which he calculated as being about 9 feet wide at the relevant area where the impact occurred. He estimated that a car width would be approximately 5 feet 7 inches. The tricycle would have been approximately 2 feet 6 inches wide.

The Plaintiff's case

[3] It was the plaintiff's evidence before me that he thought he had had enough room to permit the car to go past him when he came out on to the road. It had been his intention to turn left and travel to a neighbour's house further down that road.

[4] His mother Breda Kelly had given evidence that after hearing a thud and her child calling her she had run from her home on to the road and witnessed the aftermath. She claimed that the defendant said, "I did not see him".

[5] It was Mrs Kelly's evidence that subsequently the defendant had spoken to her other daughter telling her to stop crying and adding, "He was out on the road. He came out on the road".

[6] Mrs Kelly further deposed that after the accident she also observed that the defendant's car had suffered a puncture. Two of her neighbours – Mr & Mrs Bracknell – came on the scene and changed the wheel for Mrs Nugent.

[7] Therefore it was the plaintiff's case that the defendant should have been driving extremely slowly on this narrow country road, hugging as far as possible the left-hand verge. This was particularly the case where the defendant ought to have been aware that on a Sunday afternoon, with housing nearby, children might well come out on to the roadway.

The defendant's case

[8] The defendant's case was based on the evidence of Mrs Nugent and an engineer, Mr McLaughlin. Mrs Nugent was 78 years of age at the time (her date of birth was 21 October 1929). She said that she had been driving on the centre of the road when she saw the child come out on the tricycle fairly quickly from his home on her right hand side. She immediately applied an emergency stop but could not recall any contact with the child.

[9] She conceded that she first saw the child when he was at the edge of the road i.e. she did not see him between the pillar of the house and the edge of the road which was a distance of 4-5 feet. She had no recollection of her car suffering a puncture or it being repaired.

[10] The engineer, Mr McLaughlin, on her behalf indicated that he had measured the width of the road at the relevant area being about 8 feet 6 inches wide making due allowance for the fact that cars would not travel on the gravel to the side of the road. At 8 foot 6 inches, with the width of her car being 5 foot 6 inches, it left 1 foot 6 inches on either side. He measured the tricycle as 2 feet 6 inches. Mrs Nugent had said that she was travelling at just

over 20 miles per hour. At 20 miles per hour the stopping distance would be 40 feet including braking distance and at 25 miles per hour it would be 66 feet.

[11] Mr McLaughlin accepted that if the plaintiff's vehicle had been turned and was tight to his left i.e. aligned parallel to the road and the defendant's vehicle was very tight to her left, that gave the defendant a better chance to avoid an impact than if the child had come at right angles on to the road.

Factual Conclusions

[12] On the issue of primary liability I am satisfied that on the balance of probabilities the plaintiff should succeed in this case. Whilst I have no doubt that Mrs Nugent was doing her very best to give honest and sincere evidence, I was concerned about the gaps that were present in her account. In the first place, she had no recollection at all of her car being punctured or of it being repaired. I am satisfied that this in fact happened and she has simply forgotten completely about it. It persuaded me that for whatever reason Mrs Nugent has serious gaps in her recollection about this accident. Secondly, she seems to have had a complete blank so far as seeing the child emerging from the entrance to the house and the edge of the road. It confirms the assertion by the plaintiff's mother that at the scene the defendant told her she had not seen the plaintiff. Regretfully I consider that this failure indicates that she was not keeping as careful a lookout as she should have been. The houses were at a location where there was a danger of people emerging into her path and she ought to have had her attention closely focused on this area.

[13] I also consider that on a road such as this, she should have been travelling at little more than crawling speed approaching these entrances and hugging the left hand side as tightly as possible notwithstanding the presence of gravel until she had passed the three houses. She must have realised the margin for error was extremely small if a child did appear on to the road. Whilst this may sound as if it is a counsel of perfection, nonetheless I believe it is the kind of precaution that a prudent driver should have taken on such a road in these conditions.

[14] I am also satisfied that the probabilities are that the plaintiff had , as he said, turned sharp left to keep parallel to the road because he was going to a neighbour's house on the same side as his house further up the road. I am not minded to accept the evidence of the defendant that the child came out at right angles because in the first place I do not believe that she remembers very much at all about this accident and secondly, I can see no reason for the child to have so done given that he was intending to turn left to go to the neighbour's house.

[15] I have decided that on the balance of probabilities this accident could have been avoided if Mrs Nugent had been keeping a more careful lookout,

had been hugging the left hand side of the road rather more than she did, and had been driving at a crawling speed. Just over 20 miles per hour is obviously not excessive but it does not recognise perhaps the dangers of the roadway at this point at a time when the danger of children emerging should have been present to her mind.

Contributory Negligence

[16] The fact that a child is the plaintiff does not prevent a finding of contributory negligence. The crucial matters are the child's age and understanding. Infancy, as such, is not a "status conferring right" so that the test of what is contributory negligence is the same in the case of a child as of an adult. See Lord Sumner in Glasgow Corp v. Taylor [1922] 1 AC 44 at page 67. However that test is modified to the extent that the degree of care to be expected must be proportionate to the age of the child. The conduct of a child plaintiff cannot amount to contributory negligence if it was no more than could be expected of a child of that age. The degree of care it is appropriate to expect of a child is a matter of fact for decision on the evidence in the particular case. See Minter v. D&H Contractors (Cambridge), The Times, June 30, 1983).

[17] Whilst therefore there is no age below which, as a matter of law, it can be said that a child is incapable of contributory negligence, the authorities and the leading textbooks trace a number of individual cases where no such finding has been made. In Jones v. Lawrence [1969] 3 All ER 267 a 7 year old boy, who was going to a fun fair, ran out from behind a parked van on the offside of a road, without first looking to his right or left and collided with a motor cyclist travelling at about 50 miles per hour in a 30 miles per hour speed restricted area. The child was held not guilty of contributory negligence it being accepted that children of that age were prone to forget what they had been taught about road safety if their minds were engaged elsewhere.

[18] At the other end of the spectrum, a recommendation has been made that the defence of contributory negligence should not be available in cases of motor vehicle injury where the claimant was under the age of 12 at the time of the injury. See The Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd 7054 – I (1978) para 1077.

[19] Charlesworth and Percy on Negligence 12th Edition at paragraph 4-39 et seq set out a large number of cases where contributory negligence has been established including one where an 11 year old boy was found 75% to blame for a motor accident when he had run out and tried to cross the road without looking for moving traffic [Morales v. Eccleston [1991] RTR 151 CA]

[20] In Northern Ireland, Deeny J held a 10 year old girl 15% negligent in a road traffic accident where she had failed to appreciate that a van was obstructing her vision to her left and failed to pause to look before starting to cross a road. He had not been addressed by counsel on any authorities on the point but he considered that 15% was a reasonable estimate [SH, a minor by her father and next friend, Bernadette Farrell [2007] NIQB 42.] I was also informed anecdotally of a jury case in Northern Ireland where an 8 year old was found guilty of contributory negligence in a road traffic accident.

[21] For my own part I consider that 9 years of age is a borderline case so far as contributory negligence of a child is concerned albeit I do not accept the barrier of 12 years recommended by the Royal Commission referred to at para 18 supra. Much will depend upon the particular circumstance of the case, the accident and the child. In the instant case the plaintiff did acknowledge that whilst he had had no road traffic safety lessons in school until aged about 10 or 11, he did know it was dangerous to go out on to the road at this age and that his mother and father would not let him take his tricycle on to the road.

[22] In all the circumstances I have come to the conclusion that there should be a deduction of 15% by way of contributory negligence.

Quantum

[23] This child suffered a displaced mid shaft right femoral fracture and a fracture of the right tibia mid shaft. Both injuries were closed. In addition he sustained bruising and soft tissue injury to the right hand and chest. He required in patient hospital stay for 2 weeks and underwent surgery to put flexible intra-medullary nails to the right femur and right tibia. A good outcome has been achieved other than a small limb length discrepancy which may need further intervention.

[24] I value this case at £25,000.

Conclusion

[25] I therefore award this plaintiff £21,250 with interest at the conventional rate for general damages and costs to be taxed in default of agreement.