

Neutral Citation no [2004] NIQB 13

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*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 03/03/04

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

LEANNE COLETTE MARY BURKE

PLAINTIFF;

-AND-

SOUTHERN EDUCATION AND LIBRARY BOARD

FIRST DEFENDANT;

-AND-

N K FENCING LIMITED

SECOND DEFENDANT.

HIGGINS J

[1] The plaintiff was born on 8 November 1982. In August 1997 she lived in Drumbeg North, Craigavon and was a pupil at the local Lismore Comprehensive School. By a Writ of Summons and Statement of Claim dated 20 June and 14 July 2000 respectively she claims damages for personal injuries, loss and damage against the Southern Education & Library Board. On 15 November 2001 N K Fencing Limited was joined as second defendant and an amended Statement of Claim was served on 14 June 2002.

[2] On 7 August 1997 around 2.30pm the plaintiff along with three friends entered the grounds of Brownlow College, Craigavon, intending to go to shops at Legahory and then on to the Craigavon Lakes . At the rear of the

school grounds they climbed a gate in the palisade iron fence. When attempting to descend from the top the plaintiff became impaled on the splayed top of the gate and suffered a serious injury to her left arm. Her companions managed to lift her up and off the fence and down to the ground.

[3] Craigavon was designed and constructed as an open-plan urban area with pedestrian pathways and cycle tracks and open access to public buildings and their grounds. Notwithstanding this open plan the public still took short cuts. Unhappily civil unrest and vandalism prevented the continuation of this ideal environment. School buildings in the area were no exception to this mindless violence and they suffered arson, criminal damage and burglaries on a substantial scale. In 1991 St Anthony's School was completely destroyed by a bomb. In the summer of 1996 serious civil unrest led to attacks on public buildings including serious and significant damage to classrooms and other parts of schools, including Brownlow College. The experience of those at Brownlow High School was that from the time since the school opened there was a degree of casual vandalism which progressed to burglary and then arson. The attacks got worse until they were almost endemic. The Principal and the Board of Governors lobbied the Southern Education and Library Board (the Board) for protective fencing. The Board offered security guards but they had little effect in stemming the burglaries, criminal damage and arson. In April 1996 the music room was broken into and much damage caused and musical instruments stolen. On different dates in July 1996 the science room was set alight and the canteen broken into and set on fire. The canteen was destroyed. In September 1996 there was a petrol bomb attack on the Assembly Hall and Gymnasium In response to that level of violence the Board agreed to the school being fenced to keep intruders out. This protective work was completed just before the Easter holidays in April 1997.

[4] Brownlow College is bounded to the north and east by the Tullygally Road, to the west by the Legahorey Road and to the south by Brownlow Recreation Centre and open ground. The entrance to the school grounds is from the Tullygally Road. The school buildings are set in large grounds that include several playing fields. The entire premises are enclosed by the palisade metal fence. The fence is approximately 2.45 metres (8 feet) high. The vertical palisade bars (or pales) are 65mm wide and 85mm apart. The pales are "split, fanged and pointed " several inches from the top and this forms what I shall refer to as a splayed top or spike at the top. The fence is secured on the inside by two horizontal bars or rails, one near the bottom and the other 2.12m above ground level. The upper rail is several inches below the fang or spike. There are four gates at various locations in the fencing, including one at the entrance on Tullygally Road. The gates are of similar construction to the fence. The gate, the subject of these proceedings, is located at the rear of the premises It is suspended on a box section on one side of the gate. On the opposite side of the gate there is a horizontal latch bar 1.33m

above ground level, which when locked is secured to the end box section of the palisade. Below the latch bar there is an anchor bar with a horizontal handle. The anchor bar is secured in the ground. The horizontal rails, the anchor bar and the latch could provide foot and hand holds for someone wishing to scale the gate from the inside. There are no corresponding holds on the outside of the fence and the gaps between the palisades are insufficient to enable someone to wedge their feet using the inner horizontal bars. The pales at the front of the school facing Tullygally Road are rounded at the top rather than splayed or fanged, for aesthetic reasons. The school grounds to the south and west were regarded as more vulnerable to intruders.

[5] An experienced Senior Architectural Technician within the Architectural Division of the Board drew up the specifications for the fencing. They were based on standard generic specifications for palisade fencing that is used in all schools and government buildings in the southern board area and throughout Northern Ireland. This type of palisade fencing is regarded as a good secure standard fence for schools, which if absent or insufficient for the purpose, might result in the loss of an entire school. It is designed to keep intruders out and not to keep people or pupils in. When the specifications were drawn up no consideration was given to the possibility of children on the inside seeking to scale the fence to get out nor to the presence of foot and hand holds on the inside of the fence. The purpose of this fence was to keep intruders out and was therefore designed in such a way that the fence would be difficult (if not impossible) to scale from the outside. The school authorities were not consulted about the details of the specification as the fencing conformed to the standard used by the Board in other establishments.

[6] This type of fencing conforms to British Standards. BS 1722 Part 12 1979 paragraph 6 states -

“The specifications of security palisade fences has been prepared on the basis that it may be necessary for the occupier of vulnerable or potentially dangerous installations to demonstrate that all reasonable practical precautions have been taken to keep casual intruders, including children for their own protection.

In developing the design and installation of security palisade fences, the supplier and the purchaser should exercise care to avoid providing projections or footholds on the face of the fence and gates that could aid climbing.”

Section 4.2 of BS 1722 on Pales states -

“The tops of pales shall be shaped or left plain as specified by the purchaser. The tops of pales in security fences shall be pointed, split and fanged. “

[7] Once the specifications were drawn up by the Board’s Architectural Division, the contract for the construction and erection of the fence was awarded to NK Fencing Limited , the second named defendant, who fulfilled the contract according to the specifications prescribed. The evidence of their Contract Director was that this was a very common type of fencing which was used widely throughout Northern Ireland in schools, factories and government offices. After the bomb explosion in 1991, St Anthony’s Primary School was rebuilt and a fence similar to the subject fence was erected around it. St Anthony’s School is located on the western side of Legahorey Road opposite Brownlow College. Since the serious public disturbances referred to above all of the schools in the Craigavon area, now have fencing of this type including Lismore Comprehensive, the school attended by the plaintiff.

[8] The entrance to the school is via Tullygally Road where there are two entrances or exits. Each entrance has a gate or gates of similar construction to the subject gate. Each entrance consists of a wide carriageway for vehicular and pedestrian traffic. The entrance nearest the school buildings is referred to as Gate A and is so marked on the plan prepared by Mr Sherry the plaintiff’s expert witness. The carriageway provides access to a car park and a pathway which runs to the main school building and round the side to the all-weather playing fields at the rear. On the other side of the all-weather playing fields there is a tarmac path that runs to the edge of the school grounds, and then turns northwest and continues over open ground to the Legahorey Road where it exits opposite the entrance to St Anthony’s School. Turning left at this exit and continuing on down the Legahorey Road leads to the shops at the Legahorey Centre. The new fence bisects this pathway just before it turns northwest toward Legahorey Road. The subject gate, which is known as the back gate, straddles the pathway. It would appear that the gate was located at that point in the fence to enable that path to be used when the gate was open. Some of the pupils who walk to school would use that path and/or a track across the grass area located to the south of the school grounds. A fourth gate is located on the southeast side of the school grounds adjacent to Brownlow Recreation centre. This gate is close to Tracy Track and gives access to the Recreation Centre from Tulygally Road. It is known as the side gate. Thus there are four gates in the fencing providing access to and exits from the school grounds. During term time all four gates are opened by the caretaker. Gate A is opened first about 0800 and then the other gates before 0830. The side gate and the back gate are opened to facilitate access on foot for those pupils coming from estates located roughly to the south and west of the school. Both the side gate and the back gate are closed around 0920 and remain closed throughout the school day. They are reopened at 1445 to permit the children to return home and closed again between 1645 and 1700. The

gates at the front entrance are closed at the end of the school business day. Thereafter until 0800 or 0830 the following day all the gates remain closed. During school holidays only Gate A is open during the day. The other three gates are permanently locked. During the summer holidays the school office remains open and routine maintenance to the buildings and grounds is carried out. The school buildings also house the Craigavon Teacher's Centre. Access to the premises is required for all these purposes. Thus Gate A is open during the working day in the summer vacation from 0830 to 1700 .

[9] Prior to the erection of the fence the open nature of the school and surrounding grounds gave rise to use of the school grounds by young and old, as access to or a short cut to other areas. The path that leads from the all-weather playing fields to Legahorey Road was used for this purpose and probably Tracy Track as well. The plaintiff was taken to primary school through the grounds of Brownlow College by her mother, though the last occasion was probably about 1992. The playing fields were also used by local people for recreational purposes and by local sports clubs. There appears to have been no formal arrangement for this use but the school authorities tolerated it. Mr E J Lennon is the principal of Brownlow College and lives a short walk from the premises. His evidence, which I accept, was that after the erection of the fencing the use of the school grounds changed. The sports clubs returned to their own grounds. The casual traffic through the grounds and the use of the playing fields outside school hours ceased. However during school days mothers with young children would continue to use the paths to take their children to St Anthony's Primary School and presumably back again. Understandably the school had no objection to this taking place as it occurred at the times when the gates were open for use by their own pupils. Mr Lennon said his experience was that people who walked through the school grounds and found the gate closed would turn and walk back. He had no experience of anyone climbing over the fence or the gate. He said it was self evident that the fence was now blocking the route and the local people realised quite quickly that there was no longer any access and they accepted that it was no longer open ground and ceased to use it. Mr Lennon agreed that the erection of a sign stating that there was no longer any through-route might have deterred people from walking through to the gate, though his experience was that signs stating 'no trespass' were usually ignored. The pupils were told regularly that the fence was not to be climbed, as it was potentially dangerous. However there was no evidence that they did so to the knowledge of the school authorities.

[10] The plaintiff is now 20 years of age and is employed as a pharmacy assistant. She lives in Drumbeg North, which by foot is, I understand, a 15 minute walk from Brownlow College. At the time of her injury she attended Lismore High School, which is a short distance from Brownlow College. On 7 August 1998 she met her friend Julie and they set off to walk to the shopping centre, but decided to go to Legahorey first. It later transpired in her evidence

that there were four in the group not two as she stated first. The other two were sisters who were pupils at Brownlow College . When the party arrived at Tullygally Road they saw the school gate (that is Gate A) was open. They decided to go through the school grounds “as they always used to take that route”. It was a short cut to the Legahorey shops and the plaintiff had used it lots of times, with her mother when she was younger and on her own when she was older. She said it saved them about 20 minutes walking time by comparison with walking along Tullygally Road and then along Legahorey Road. The evidence of Mr T Wright a consulting engineer and the expert witness called on behalf of the defendants, demonstrated that the saving would have been no more than two minutes. This is also evident from the ordnance survey map of the area. In cross-examination the plaintiff said that the last time she had walked through the school grounds was probably a year before the date of her injury. There had been no fence on the premises on that occasion. She was aware of the fence being constructed earlier in the year and knew there had been a change. However she had not been round the back of the school and had not observed the fence at the rear.

[11] After passing through the entrance gates the group walked along the path around the buildings and over the all-weather playing fields. They came upon the gate and saw that it was padlocked. The plaintiff said her friend who was 15 years of age decided to climb over it. The plaintiff said she told her friend that as she was the smallest she would not be able to get over it. There was a discussion whether the plaintiff should climb the gate. She was not too keen on the idea and did not think she would be able to succeed. She said she had never climbed a fence like that before. She knew the fence was there for a reason and that she should not be climbing over it. She knew the spikes were present to keep people out and stated she would not have climbed it from the outside. The first two girls got over so she felt that she could, though if she had been on her own she would have turned back. She then decided that she would climb over it. She saw the spikes at the top but did not consider how she would get over these. The other two girls Margaret and Kathleen who were both 15 years of age climbed over first. Then the plaintiff started to climb using the lower horizontal bar, the handle of the anchor bar and the latch bar. She got one leg over the spikes and her foot on to part of the latch bar on the other side of the gate. She could find nowhere to put her other foot to support herself and was unable to reach the ground. Then she slipped and was left hanging on the gate. She thought her arm bracelet was caught in the spikes, but after her friends lifted her down, she discovered the injury to the inside of her left arm. After the plaintiff was lifted down, the remaining girl who would have been Jolene Rock, climbed over. One of her friends then went to the nearby medical centre and brought a doctor to the scene. The plaintiff was taken to the casualty department of Craigavon Hospital and then transferred to the Ulster Hospital. She had sustained a very serious wound whereby the muscle bellies of the flexor carpi radialis, brachio radialis, flexor pollicis longus and the flexor digitorum

profundus were divided and the pronator teres severely damaged. The flexor pollicis longus (the muscle to the thumb) could not be repaired. The other muscles were repaired, though not satisfactorily. The overall function of the plaintiff's hand was impaired. In particular she was unable to bend her thumb and was unable to straighten her fingers. Further surgery and physiotherapy have improved her hand function. She has a permanent curved scar 15cm in length running from the left elbow down the forearm and pain in her left wrist joint. For the two years after the injury she had to give up competitive disco dancing which she engaged in with 10 other girls, at venues in Belfast and Scotland.

[12] The only other girl to give evidence was Jolene Rock who said she climbed the gate second. She described how she did it. She also claimed that she last used the route about one year before and that this was the first occasion she had climbed the fence though she had observed some boys doing so. Thus the evidence of the plaintiff and Jolene Rock was that this was the first time they were confronted by the fence and the first time they climbed it.

[13] The case made on behalf of the plaintiff prior to the hearing was set out in the amended Statement of Claim dated 14 June 2002. The first defendant was sued as the owner and occupier of the school premises. The second named defendant was sued as the person engaged by the first named defendant to erect a palisade fence around the said premises. The Particulars of Negligence are alleged against each defendant jointly, as are the Particulars of Breach of Statutory Duty. The breaches of statutory duty alleged refer to the Occupiers Liability Act (NI) 1957 and the Occupier's Liability (NI) Order 1987. The relevant portions of the Statement of Claim are -

“3. On or about the 7th day of August 1997, the Plaintiff was walking through the grounds of the First Defendant's premises when she encountered a locked gate in a spike topped palisade fence, which obstructed her exit from the premises, and as the Plaintiff was climbing over the said gate she caught her arm on a spike at the top of the gate and thereby sustained such personal injuries loss and damage particulars of which hereinafter appear.

4. The said personal injuries, loss and damage, which the Plaintiff sustained were caused by reason of the negligence and breach of statutory duty of the Defendants, their servants and agents and each of them.

PARTICULARS OF NEGLIGENCE OF THE DEFENDANTS

- i. Causing and creating a trap for persons walking through the school grounds;
- ii. If it was intended to prevent usage of the school grounds by members of the public, failing to lock the gates and all entry and exit points on both sides of the school rather than one side only;
- iii. If it was intended to prevent usage of the school grounds by members of the public failing to erect any or adequate warning notices prohibiting entry or indicating that the exit point on the opposite of the school was locked.
- iv. Permitting members of the public including the Plaintiff's free access to one side of the school premises whilst obstructing the exit therefrom without giving any or adequate warning thereby enabling them to avoid entering the premises in the first place;
- v. Failing to observe or pay heed that members of the public were habitually entering onto the said premises;
- vi. Failing to pay heed to evidence of constant user of the premises by members of the public, including in particular the presence of established beaten pathways;
- vii. Failing to prevent the members of the public from using the said grounds;
- viii. Failing to erect adequate gates, fences, barriers or other means of restricting access to all parts of the said grounds;
- ix. Failing to erect any or adequate warning notices, or issue any or adequate verbal warnings;
- x. Constructing a metal palisade type fence with spiked tops which was likely to cause injury in the circumstances described in the foregoing;

PARTICULARS OF BREACH OF STATUTORY DUTY OF THE DEFENDANTS

i. The Defendant was in breach of the common duty of care imposed upon it as occupier of the said land and buildings thereon, by section 2(2) of the Occupier's Liability Act (NI) 1957, and for further particulars of the said breach the Plaintiff repeats the Particulars repeats the Particulars of negligence set out hereinbefore.

ii. The Defendant was in breach of the duty of care imposed upon him as occupier of the said land and buildings thereon, by article 3 of the Occupier's Liability (NI) Order 1987, and for further particulars of the said breach the Plaintiff repeats the Particulars of negligence set out hereinbefore."

[14] The first named defendant took over the defence on behalf of the second named defendant. At the material time of this action the second named defendant was not an occupier of the school premises. The first nine allegations of negligence related to access to or use of the school premises. The case made was that the first named defendant should have prevented access to the rear of the school premises and informed the public that no through route existed and further that a trap had been created by the erection of the gate. The only allegation of negligence relevant to the second named defendant is the allegation that this defendant was negligent "in constructing a metal palisade type fence with spiked tops which was likely to cause injury" in the circumstances alleged.

[15] Mr Sherry the expert witness called on behalf of the plaintiff maintained that this type of fence and gate was not suitable for school grounds. He said that if such was to be used there should be a covering of rails on the inside of the gate to prevent access to the horizontal bars, the anchor bar and the latch bar for use as climbing aids. He did not think this would be expensive to provide. It was clear that this suggestion was very much an afterthought by the witness. Not least of the difficulties about this suggestion would be how to cover the anchor bar. It operates by rotating the handle through ninety degrees. The Director of Construction, employed by the second named defendant said this would, in effect, involve the construction of a door, which would have climbing points as well. His evidence was that the second defendant was asked to make a gate that was difficult to scale from the outside and that was what they constructed and erected. Mr Wright said it is very easy to say that there should have been an inner covering, but there are various practical difficulties about such. He

thought it might be possible to design a solid steel door with the bars and latches between the sections . However in order to gain access to them the solid door would require slots that could also be used as foot and hand holds. Mr Wright has considerable experience of palisade fences and has never seen a solid gate used in such fences. This type of fencing is widely used in Northern Ireland as an anti-intruder device. It conforms to British Standard as to design and construction both on the outside and the inside and in relation to all aspects of the gate. It is perfectly suitable for its purpose and is appropriate for schools and other public buildings for deterring intruders which regrettably is all too necessary in many parts of this jurisdiction.

[16] I was satisfied that neither the fence nor the gate were dangerous per se and that they were well suited for the purpose for which they were constructed.

[17] The substance of the plaintiff's case against the first named defendant is as occupier of the premises. Mr McNulty QC, counsel on behalf of the plaintiff, submitted that prior to the erection of the fence, a variety of people had for different purposes made use of the route through the school grounds. This was done with the permission of the Board and those persons who used the route were lawful visitors to the premises. Mr McNulty QC accepted that the fence was erected for good reasons. When the gates were locked the route through the school grounds became unavailable to anyone. However, when the gates were open, access was not blocked off and the route was available for anyone who wished to use it. He submitted that the opening of the gates constituted a clear licence for persons to use the route through the grounds. Thus he submitted that persons who entered on the school premises in order to use the route through the school grounds were licensees to whom section 2 of the Occupier's Liability Act (NI) 1957 applied. The times when the back gate was open or closed were not advertised at the entrance gate. In those circumstances it was foreseeable that persons would enter the premises and walk to the back gate and find their progress blocked by the locked gate. It was he submitted equally foreseeable that some of those persons who walked through the premises would attempt to overcome the obstacle created by the locked gate, by climbing over the gate. It was equally foreseeable that some who might seek to climb the gate in those circumstances would be children. It was foreseeable that some children would not act rationally and would not recognise or realise the dangers in climbing the gate. The gate if climbed from the inside was a danger brought onto the premises by the first named defendant and they had a duty to guard against persons whom they could foresee might climb it and thereby suffer injury when so doing. The board's Architectural Technician gave no thought to whether children might try to climb the gate from the inside, yet this was a fence and gate that were required for school premises. Alternatively Mr McNulty QC submitted that if the plaintiff was not a licensee on the premises but a trespasser then the provisions of the Occupier's Liability (NI) Order 1987 applied. In this regard

he submitted that this gate was easy to climb. It was foreseeable that children would be tempted to climb it and some of them would in fact climb or attempt to climb it. No consideration was given by the defendants to the design of the gate to prevent it being climbed, whether by the construction of a door in the manner suggested by Mr Sherry or in any other way. The defendant owed a duty to children that might climb the gate and there was a breach of that duty. Alternatively, he submitted that a warning or notice that there was no exit for pedestrians at the other end of the path should have been erected at the entrance gate.

[18] Mr N Quinn, who appeared on behalf of the defendants, accepted that, if the plaintiff was a lawful visitor to the school premises, the first defendant had an obligation towards her under section 2 of the Occupier's Liability Act (NI) 1957. While the duty is not an absolute one, fulfilment of it required an occupier to be prepared for children to be less careful than adults. He submitted that it was reasonable for the Board to fence off the school to keep out criminals and to do so with this type of fence and gate with splayed tops, that are used widely throughout Northern Ireland to protect government buildings, factories and other schools. He submitted that the suggestion of protective rails or a door like structure was not viable and there was no evidence that such a structure was used elsewhere. If the plaintiff was not a lawful visitor then she was a trespasser to whom the provision of the Occupier's Liability (NI) Order 1987 applied. He submitted that the gate was not a danger. He accepted that the splayed spikes at the top were dangerous, but only if someone climbed within reach of them. The defendant would require knowledge that persons including children would or may be in the vicinity of them. There was no evidence that persons including children habitually trespassed on the premises and climbed the gate. Only where there is clear evidence of user of the premises and climbing of the gate, would a warning of the type envisaged under Article 2(5) be appropriate. However the presence of a warning would be unlikely to deter persons including children who were fully aware of the nature of the splayed tops, that the gate was not to be climbed.

[19] Neither counsel sought to argue that the plaintiff was a visitor and not a trespasser or that she was a trespasser and not a visitor. Counsel were content to say she was one or the other and left it to the court to decide which. Of course, as will be seen, it is critical to know whether the plaintiff was a visitor or a trespasser, as the duty of an occupier to each is different.

[20] The liability of occupiers, for injury suffered by persons on their premises, is governed by two separate but linked, legislative provisions. The Occupiers' Liability Act (NI) 1957 (the 1957 Act) governs the liability of occupiers to visitors to their premises. The Occupiers' Liability (NI) Order 1987 (the 1987 Order) regulates the liability of occupiers to non-visitors, usually trespassers. Thus in any case in which both provisions are pleaded

and relied upon, the first question to determine is the status of the claimant when he or she was present on the premises.

[21] Section 1(1) of the 1957 Act provides that the rules enacted by sections 2 and 3 of the Act shall have effect in place of the rules of the common law. Their purpose is to regulate the duty that an occupier owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them. Section 1(2) provides that while the rules enacted in sections 2 and 3 regulate the nature of the duty imposed by law, they do not alter the rules of the common law as to the persons on whom a duty is imposed or to whom it is owed. Section 1(2) also provides that the persons who are to be treated as an occupier and his visitors, are the same persons who would at common law be treated as occupier and as his invitees or licensees. Thus visitors are those who have been invited on the premises and those present with the express or implied permission of the occupier. A duty of care is owed to both, more stringent in the case of invitees than licensees. Where it is claimed that a licence to be present on the premises is to be implied, the plaintiff must show that the occupier has permitted his presence and not merely tolerated it. An occupier who resigns himself to the occasional and perhaps inevitable presence of trespassers on his premises is not to be regarded as having assumed the obligations of a licensor – see *Phipps v Rochester Corporation* 1955 1 Q.B. 450. Equally there is no duty on an occupier to fence his premises against trespassers lest, if he does not do so, those who enter become licensees. What has to be proved is permission, express or implied, not tolerance of a situation. In some circumstances toleration may be so blatant as to justify the conclusion that it amounts to permission – see *Robert Addie and Sons (Collieries) Ltd v Dumbreck*, 1929 A.C. 358, per Lord Dunedin at 372.

[22] At common law no duty was owed to trespassers. An occupier was only liable to a trespasser if he did some act with the deliberate intention of doing harm to the trespasser or with reckless disregard of the presence of the trespasser – see *Robert Addie and Sons (Collieries) Ltd v. Dumbreck*, supra. The harshness of this rule was ameliorated by the doctrine of allurement in the case of young children. Furthermore knowledge of constant trespass by young children, without any attempt to prevent it, might be held to amount to implied permission to be on the premises.

[23] Section 2 of the 1957 Act set out the extent of the occupier’s duty in these terms –

“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; and

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) -

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not."

[24] Thus an occupier of premises owes the common duty of care to all his visitors. The duty is 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 purpose for which he is invited or permitted by the occupier to be there. An occupier must be prepared for children, who are visitors, to be less careful than adults.

[25] What was the status of the plaintiff when she walked through the school premises on 7 August 1998? Was she a lawful visitor in the sense in which that status is understood at law. Prior to the erection of the fence and gate, the route across the premises was used regularly by local people as a short cut either to the school itself or to the areas surrounding the school. Such use was known to the school authorities. Generally speaking those who used the premises for those purposes were visitors. Those who used it for access to the surrounding areas were probably licensees, such licence being implied from the occupier's knowledge that it was so used. That implication is probably strengthened by the fact that some of those who used it for whatever purpose were children who attended the school, as well as their parents. Following the erection of the fence and gate the occupier intended, as a consequence of its desire to keep criminals out, that access to the premises would be more limited than hitherto. Thus the licence that was tolerated hitherto, was withdrawn. From the erection of the fence and the commencement of the opening and closing of the gate as detailed above, those who used the route during those hours were visitors to the premises. Of course there were also persons, not attending or escorting children to the school, who probably used the route as a shortcut during those hours. They would have had no reason that was associated with the school, to be there. They were most likely tolerated by the school authorities whether during term time or not. They were probably not licensees, to use the terminology employed prior to the passing of the Occupier's Liability Act (NI) 1957, as their use of the premises was not constant. Another category of person who probably frequented the premises was someone who used the route, but not

constantly, in the hope that the back gate was open. The school authorities knew of such persons, but took no action to deter them from entering the premises at the front gate. The erection of the fence was signal enough that the situation had changed. The experience of the school principal was that persons who, despite the fence, entered on the premises in the hope that the gate was open, but who found it was closed, turned and retraced their steps. To the extent that they entered on the premises occasionally, but not constantly and walked to the closed gate and back, they were probably trespassers, but if their use was constant they may have been licensees. It is possible that some persons used the route in the hope of finding the gate open and when they found it closed, decided to climb it, as did the plaintiff and her friends. Such persons would be trespassers; certainly once they commenced to climb the gate they were trespassers. In this case if the plaintiff was a licensee and therefore a visitor up to the point at which she found the gate closed, she was no longer a visitor once she decided to and commenced to climb the gate. At that point she became a trespasser. There was no evidence that there was constant use of the pathway by children or adults, who climbed the gate when they found it closed nor that such use was known to the school authorities. My conclusion on this issue is that the plaintiff was not a visitor and therefore the provisions of the Occupier's Liability Act (NI) 1957 do not apply. I shall return to this Act later in this judgment.

[26] The Occupier's Liability (NI) Order 1987 makes provision for the duty of care owed by the occupier of premises to persons other than his visitors. Article 3 is in these terms -

"3.-(1) The rules enacted by this Article shall have effect, in place of the rules of the common law, to determine -

(a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and

(b) if so, what that duty is.

(2) For the purposes of this Article, the persons who are to be treated respectively as an occupier of any premises (which, for those purposes, include any fixed or movable structure) and as his visitors are -

(a) any person who owes in relation to the premises the duty referred to in section 2 of the

Occupiers' Liability Act (Northern Ireland) 1957 (the common duty of care), and

(b) those who are his visitors for the purposes of that duty.

(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in paragraph (1) if -

(a) he is aware of the danger or has reasonable grounds to believe that it exists;

(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and

(c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

(4) Where, by virtue of this Article, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.

(5) Any duty owed by virtue of this Article in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.

(6) No duty is owed by virtue of this Article to any person in respect of risks willingly accepted as his by that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(7) No duty is owed by virtue of this Article to persons using a road and this Article does not affect any duty owed to such persons.

(8) Where a person owes a duty by virtue of this Article, he does not, by reason of any breach of the duty, incur any liability in respect of any loss of or damage to property.

(9) In this Article -

‘road’ means -

(a) a road as defined in Article 2(2) of the Roads (Northern Ireland) Order 1980 and

(b) any other road or way over which there exists a public right of way;

‘injury’ means anything resulting in death or person injury, including any disease and any impairment of physical or mental condition; and

‘movable structure’ includes any vessel, vehicle or aircraft.”

[27] Article 3 bears some similarity with Section 2 of the 1957 Act, but there are significant differences. It is similar in terms to the Occupiers Liability Act 1984 that applies in England and Wales. The 1984 Act was considered recently in the House of Lords in Tomlinson v Congleton Borough Council and Another 2003 3 WLR 705. While the circumstances in that case differed greatly from the factual situation in this case, certain matters of principle relating to the scope of the 1984 Act were settled. As with the 1957 legislation it was intended that the rules enacted in the Order would have effect in place of the common law. The purpose of the rules is to determine whether the occupier of premises owes a duty to persons other than his visitors. Who the person might be is not defined or restricted. Such persons include children. The duty contemplated is in respect of any risk of the person, who is a non-visitor, suffering injury by reason of any danger due to the state of the premises or to things done or omitted to be done on the premises. Where, by virtue of Article 3 of the Order, a duty is owed, it is a duty to take such care as is reasonable in all the circumstances of the case, to see that the non-visitor does not suffer injury on the premises, by reason of the danger concerned. The danger contemplated is a danger due to the state of the premises. No duty is owed in respect of risks willingly accepted as his by the non-visitor.

The conditions in which an occupier owes a duty to a non-visitor in respect of any risk of injury by reason of the state of the premises, are defined in Article 3(3). They are three-fold. Firstly, the occupier must be aware of the danger due to the state of the premises or have reasonable grounds to believe that it exists. Secondly, he must know that the non-visitor is in the vicinity of the danger concerned or have reasonable grounds to believe that he is in the vicinity of the danger. Thirdly, the risk of the non-visitor suffering injury on the premises by reason of any danger due to the state of the premises is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer the non-visitor some protection. If all three of these conditions apply, then the occupier owes a duty of the type described above to the non-visitor. Where one or more of these conditions is not satisfied, then no duty is owed to the non-visitor. By contrast under the 1957 Act an occupier owes a duty of care to all his visitors. Under the 1957 Act the issue is whether the occupier has discharged that duty. Under the 1987 Order the existence of a duty has to be established and it arises only when the conditions referred to above are present. Whether the occupier had knowledge or foresight of the danger of injury due to the state of the premises, requires consideration of the nature of any relevant danger due to the state of the premises. The risk of injury due to things done or omitted to be done on the premises, does not arise on this issue. The fence and gate were not dangerous per se. They were in good condition and fit for the purpose for which they were constructed and erected. The plaintiff's case was that the splayed tops were dangerous due to their pointed tips. They were well above ground level and potentially dangerous only if someone was near them and that would require a person to climb up to them. There was nothing more dangerous about this fence and gate than about any other such fence and gate of which there are many situated throughout Northern Ireland. There was nothing special about its design or construction that rendered it dangerous. It contained no hidden dangers. Nor was it an allurement or a trap. The splayed tops were obvious. The plaintiff suffered injury as she chose to climb the gate. That activity was inherently dangerous. She did not suffer injury because of the dangerous state of the premises per se. She had to climb to a position where she might come in contact with the splayed tops, but she knew she should not do that.

[28] Where there is a risk of injury due to the state of the premises, the occupier owes a duty of care only where the three conditions referred to in Article 3(3) exist. I shall refer to each in turn. If there was a risk of injury by reason of any danger due to the state of the premises, namely the splayed tops of the fence and gate, was this occupier aware of such danger. Such danger would only arise if someone climbed to the top of the fence or gate. Thus the question becomes – was the occupier aware that someone might climb to the top of the gate. It was the practice of the school authorities to warn pupils from doing so. They were aware of the possibility that a person might climb to the vicinity of the splayed tops or had reasonable grounds to believe so.

The next question is whether the occupier knew that non-visitors, like the plaintiff, were in the vicinity of the danger, that is the splayed tops. There is evidence that the school authorities were aware that non-visitors entered on the premises and made their way to the gate and on finding it closed turned back. There is no evidence that such persons then climbed the gate in order to proceed with their journey, thus putting themselves in the vicinity of the danger. Equally there is no evidence that the school authorities had reasonable grounds to believe that non-visitors were in the vicinity of the splayed tops.

[29] The next question is whether the risk of danger, that is of someone climbing the gate to the level of the splayed tops and injuring themselves on them, was one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer the non-visitor some protection. The risk of injury in climbing the gate and attempting to get over it, is an obvious one. It is certainly an obvious one to an adult. Is it to a fourteen year old and in particular to this fourteen year old. When the plaintiff gave evidence in the trial she was 20 years of age. Mr McNulty submitted that there would be difficulty in assessing whether the risk was obvious to the plaintiff when she was fourteen or fifteen years old, at the time of her injury. While the plaintiff gave evidence when she was 20 years old, nonetheless the court is entitled to look at the content of the plaintiff's evidence, in particular what she said and did on the occasion in question and the lifestyle she lead, in order to judge whether she was a fourteen year old to whom the risk was an obvious one or not. The plaintiff was aware of the presence of the gate, why it was erected and of the danger of climbing it. She was a pupil at the local Lismore Comprehensive School, where similar gates had been erected some time previously. She was an average teenager who engaged in disco dancing competitions with other girls, not just locally in Craigavon, but as far away as Scotland. In my view she was not someone against whom the council might reasonably be expected to offer some protection against climbing this gate. The form of protection suggested was a protective covering over the gate or a warning sign at the entrance that the gate was closed. Such a protective cover as was suggested by Mr Sherry was neither feasible nor practical. In relation to the warning sign I accept the headmaster's evidence and agree that such warnings are more usually ignored. In *Tomlinson v Congleton Borough Council*, supra, at paragraph 46, Lord Hoffman stated the circumstances in which the duty of care arises, in these terms -

“A duty to protect against obvious risks or self inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees or some lack of capacity, such as the inability of children to recognise danger.”

[30] The plaintiff was someone well able to recognise danger. In my view she was aware of it on this occasion. She knew and recognised the risk involved and decided to take that risk.

[31] The duty of care owed by the occupier in respect of the risk of injury by reason of the splayed tops (if it existed), is to take such care as is reasonable in all the circumstances of the case to see that the non-visitor does not suffer injury on the premises by reason of that risk Whether the occupier has taken such care involves an assessment of the likelihood that someone may be injured on the splayed tops by climbing the gate from the inside, as well as an assessment of the social value, in terms of the protection of the school from vandals, to be gained from the presence of the fence and gate. The risk of injury from the splayed tops was remote or slight. The danger from them, if the gate was climbed, was obvious. In those circumstances it is not reasonable to expect an occupier to take any steps to prevent such a remote and slight risk, even to a fourteen year old.

[32] My conclusion is that in the circumstances of this case it has not been proved that the school authorities failed to take such care as was reasonable in all the circumstances to see that the plaintiff did not suffer injury on the school premises by reason of the presence of the splayed tops. The danger from the splayed tops was so obvious, even to this fourteen year old, that it was not necessary for the school authorities to provide any warning of the danger of the splayed tops, if the gate was climbed, either at the gate itself or at the school entrance.

[33] If the plaintiff was a visitor, which I am satisfied she was not, the first defendant would have owed her the common duty of care under the 1957 Act. This duty is to take such care as in all the circumstances is reasonable to see that she would be reasonably safe in using the premises for the purpose for which she was entitled to be there. The purpose would have been to walk along the path, not to climb the gate. It was suggested that the school authorities should have erected a sign warning that the back gate was closed and that they thereby failed to take such care as was reasonable to see that the plaintiff, a fourteen year old girl, was reasonably safe on the premises. The school authorities must be prepared for children to be less careful than adults. However, this fourteen year old girl was well aware that the gate was there for a purpose and was not to be climbed. I do not consider the school authorities required to erect a notice warning pedestrians that the gate was closed in order to secure the premises as reasonably safe for the plaintiff. The duty of care requires the school authorities to do what is reasonable. They did that by the erection of the fence and gate which, it was obvious, should not be climbed. Not erecting a warning sign could not be said to be unreasonable.

[34] Whether one considers this case under the 1957 Act or the 1984 order or common law, the plaintiff has not established that, if she was a visitor the

first defendant breached the common duty of care owed to visitors, nor if she was a trespasser, that she was owed a duty of care or if owed such a duty, that the first named defendant was in breach of it. Equally no case has been made out against the second named defendant in the relation to the construction of the gate. Regrettably the plaintiff suffered a serious injury. However in order to succeed she has to prove either negligence or a breach of statutory duty. In the circumstances of this case I find that neither has been proved. There will be judgment for the defendants.