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Judgment: approved by the Court for handing down | *Delivered:* **23/9/08**
*(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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2004 No 1822

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BETWEEN:

SEAN JUDE McKINNEY (a minor)
by his mother and next friend, Elizabeth McKinney

Plaintiff;

and

REVEREND FATHER HUGH KENNEDY, REPRESENTING THE TRUSTEES OF SACRED HEART PRIMARY SCHOOL

Defendant.

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McCLOSKEY J

I INTRODUCTION

[1] Sean Jude McKinney, the Plaintiff in this action, was born on 8 September 1988 and is now aged 20 years. He claims damages for personal injuries allegedly sustained by him arising out of an accident alleged to have occurred on 30 June 2001 within the curtilage of the premises of Sacred Heart Primary School, Belfast ("*the school premises*"). The Plaintiff was then aged 12 years. His action is brought against the Reverend Father Hugh Kennedy, as representative of the trustees of the school. It is not disputed that the trustees are the owners and occupiers of the school premises.

[2] In brief compass, the Plaintiff's case is that during the afternoon of 30 June 2001, in the course of playing football with friends at the school

premises, he ascended to a relatively low single storey roof for the purpose of retrieving the ball. In the course of attempting his descent to the ground, his left hand came into contact with a sharp metal device fitted to the roof. This inflicted a nasty tearing injury. It is common case that the offending device was a climbing deterrent. Its function was to discourage access to and along the roof in question. It was contended that, in installing this device, the Defendant was guilty of providing a trap, essentially because it had a relatively harmless appearance but, in reality, was dangerous, deceptively so.

II THE EVIDENCE - A SUMMARY

[3] On the accident date, 30 June 2001, the school had closed for the annual Summer vacation. The term had ended some few days previously. The Plaintiff had just completed his first year at St Patrick's Secondary School, Belfast. He had formerly been a pupil at the Sacred Heart Primary School, until June 2000. His address at the time of the accident was 7 Glenpark Street, Belfast, not far from the school premises.

[4] The Plaintiff testified that at around 3.30 pm to 4.00 pm on 30 June 2001, he was a member of a group of some 12 or 14 boys who were playing football on an open hard surfaced recreation area within the school premises. They had gained access to the premises via a gap in the perimeter fencing proximate to 15 Arbour Street, at the rear of the premises. The point of access was depicted in photographs 11 and 12 and was further identified in the accompanying location plan. According to the Plaintiff, two of the upright members of the perimeter palisade fence were missing on this date. The Plaintiff gave evidence that he and one of his fellow players, whom he identified as an English boy named Edmund, climbed on to a single storey roof with a view to retrieving the ball. They gained access to the roof by scaling a protective metal window cover. They then made their way along the roof, passing the offending fitting and successfully retrieved the ball, which had nestled in a recess above a double door. [I refer particularly to photographs 2, 3 and 4, in this context]. Having returned the ball to their friends, they then proceeded back along the roof, in the opposite direction.

[5] The offending fitting is situated directly above a downpipe. The Plaintiff testified that, on the return journey, he made his way as far as this point, whereupon he attempted his descent. According to him, he had his back to the playground and he was, therefore, facing the building. In this position, he attempted to drop to the ground. In the course of this manoeuvre, his left hand came into contact with the right hand side of the offending fitting, with resulting injury. The Plaintiff suggested, uncertainly, that the fitting may have moved or "spun". He testified that everything happened very quickly.

[6] In examination in chief, the Plaintiff testified that he had played football at the school premises on previous occasions. He was notably hesitant about the number and frequency. He initially suggested that this occurred once a week. Later he testified that it occurred "*now and again*". He further suggested that it occurred "*every couple of weeks*". He also appeared to suggest that it occurred only during the Summer season. He claimed that on every occasion access to the school premises had been secured through the same gap in the perimeter fencing. He suggested that he and his friends had never been challenged by a person in authority. He rejected the suggestion that he knew that entering the premises outside conventional school hours was in breach of the school rules. He then testified that he could not remember whether a rule to this effect had been promulgated on occasions such as school assembly. He readily acknowledged that he knew that he had been trespassing on the occasion in question. The word "*trespassing*" was his. He accepted that the purpose of the offending fitting was to deter access to the roof. According to him, one of his friends, Gerald Pettigrew, had commented that day that the school caretaker would not throw them out and that it was alright to play football there.

[7] In response to questions from the court, the Plaintiff testified that this was the first occasion on which he had indulged in playing football at the school premises outside normal hours, contradicting his earlier evidence. Continuing, he explained that he and his friends normally played football at the location known as "Ballybone" Square, which is in close proximity to the rear of the school premises. He was not a member of any football team. He claimed that the school premises constituted a better location for playing football, as the "pitch" was bigger and the surface was superior. The Plaintiff's evidence about his previous user of the school premises was demonstrably uncertain and unreliable.

[8] The Plaintiff's evidence was corroborated by Michael Hardy, who testified on his behalf, in certain material respects. Mr Hardy testified that the ball had become trapped on the roof above the double doors, following which the Plaintiff and the other boy, Edmund, went to retrieve it. They did so successfully and the Plaintiff threw the ball back to his friends. The Plaintiff then tried to descend to the ground, in the manner described in his evidence. Mr Hardy did not observe how the injury was sustained. He was aware of the school rule outlawing football outside official hours.

[9] One of the main issues explored in the evidence was the steps taken by the Defendant to secure and maintain the perimeter fence and to deter access to the roof in question. On behalf of the Defendant, evidence was given by, firstly, Thomas Donnelly, who worked at the school between 1968 and September 2006. Mr Donnelly was initially a teacher. He was vice principal from 1991 and became principal in 1993, a post which he held until his

retirement. He explained that the school premises were newly constructed in 1987. From 1988, the school became subject to significant vandalism. This entailed frequent and substantial damage to windows, roofs and skylights. This occurred particularly at weekends and during the period from Easter to September. On some occasions, there were as many as 30 or 40 people on the roof.

[10] According to Mr Donnelly, the most vulnerable part of the school perimeter was the fencing in proximity to "Ballybone" Square (i.e. in the general vicinity of where the Plaintiff allegedly gained access), together with the school boundary with the former grounds of Cliftonville Cricket Club. The latter grounds were unsecured, open to everyone. Mr Donnelly testified that the existence of damage to the perimeter fencing was ascertained by school management in a number of ways. Firstly, the pupils and playground supervisors were wont to inform members of staff about defects in the fencing. Secondly, the fencing was inspected periodically by the caretaker and he also made reports about defects. Thirdly, Mr Donnelly himself inspected the entirety of the fencing shortly before the end of each school term, with a view to ensuring that the school premises were secure during holiday periods. Fourthly, Mr Donnelly was on playground duty in the vicinity of the relevant length of perimeter fencing each morning and at lunch time, when he augmented the supervisory staff, giving him some opportunity to observe the condition of the fencing. His own detailed inspections of the perimeter fencing were of varying frequency. Whilst he invariably conducted the end of term inspection described above, during some terms he might inspect up to 10 or 15 times. His inspections uncovered defects in the fencing on a number of occasions. The defects included missing bolts, fire damage and tunnelling under the fence. As school principal, Mr Donnelly had the responsibility of completing the necessary requisitions and submitting these to the Belfast Education and Library Board ("*the Board*") for action. He also completed, and submitted, the relevant insurance reports. Urgent repairs would be carried out within a couple of days, while less urgent repairs were executed within a slightly longer period of time. Repairs to the perimeter fencing ranked as an urgent matter.

[11] Mr Donnelly also gave evidence about repairs to the school premises during the period June to September 2001. The evidence about these matters included copies of certain insurance reports and requisitions. Mr Donnelly was the author of these documents. One of the insurance reports, signed by him and dated 12 June 2001, documented a series of defects, including "*broken perimeter fence*". The corresponding "R*equisition for Repairs*" is also signed by Mr Donnelly and dated 11 June 2001. It states:

"*To secure perimeter fence at back of school*".

The evidence was that the relevant length of perimeter fencing is situated at the "back" of the school. A perusal of a series of copy requisitions indicates that in some instances, Mr Donnelly wrote "*done*" on the document, whereas in others he did not. He did not write "*done*" on this particular requisition [No 165319]. His evidence was that he had no rigid practice in this respect.

[12] Mr Donnelly accepted that there were intruders and unauthorised users of the premises from time to time. Some conducted themselves innocuously, while others engaged in criminal and anti-social activities. He further accepted that children gained unauthorised access to the premises to play football, from time to time. He did not know whether they were "chased" by the school caretaker. He acknowledged the importance of having a system of periodic inspection of the perimeter fencing. He described the system which existed as informal, with the exception of the fixed, recurring end of term inspections. He added that the school playgrounds were inspected every morning before classes began and that discovery of certain alien objects during this exercise would precipitate further inspection of the perimeter fencing. He maintained that the repairs to the fencing specified in requisition No 165319 were carried out. He further suggested that he would have asked the Board contractor to carry out any other evidently necessary repairs to the fencing. The time lapse between requisition and works of repair was normally some few days.

[13] Mr Donnelly also gave evidence about the duties of the school caretaker. Previously, the incumbent had been Mr Seamus O'Labhradha, whom he described as very competent, highly trained and very reliable, knowledgeable of all the "procedures". The caretaker's duties included daily inspections of the school playgrounds, every morning. Mr O'Labhradha had left his job some months before the accident. His replacement was Alan Murphy, who held the post from 27 May to 9 September 2001 [which period encompasses the accident date]. Mr Donnelly was Mr Murphy's line manager. As Mr Murphy was new to the job, Mr Donnelly initially took responsibility, solely or jointly, for a lot of his duties. He supervised Mr Murphy and he carried out appropriate "on the job" induction. Mr Murphy had previous experience as a caretaker, though not at an inner city school.

[14] Mr O'Labhradha testified that he hard been school caretaker for almost six years, until January 2001. He had previously worked at a secondary school which experienced similar vandalism problems. The main problem was vandalism during weekends and school holidays, particularly during the Summer period. He was often the last person to leave the premises. On his first day at work, Mr Donnelly drew his attention to the relevant length of perimeter fencing, highlighting that this required particular attention. Subsequently, Mr O'Labhradha detected the removal of parts of the perimeter fencing on certain occasions. Throughout his period of employment, he resided at nearby 7 Rosapenna Parade (where he still lives). He gained access to the school every morning via the pedestrian entrance at Harcourt Drive.

Upon doing so, he "walked" the entirety of the perimeter fencing, examining it visually and palpating it with a wooden walking stick. He accepted that outside normal school hours games of football were held on the school premises on some occasions. He testified that pupils at the school often asked to play football after hours and permission was invariably refused. At the end of each week he would ascertain whether works of repair specified in requisitions submitted to the Board had been completed. If not, he would pursue the matter accordingly. He further testified that Mrs McCann, a teacher who had the additional designation of school environment officer, paid particular attention to the relevant section of the perimeter fence. She worked in the senior school, on the upper floor of the two storey building overlooking the playground in question. Towards the end of every term, Mr Donnelly and Mr O'Labhradha invariably inspected the perimeter fencing.

[15] The final factual issue explored in some detail related to the offending fitting. This did not form part of the building as constructed. Rather, it was installed some considerable time later. Mr Donnelly and Mr O'Labhradha both testified that it had been fitted approximately one year before the accident date. This occurred following consultation between Mr Donnelly and the Architects Department of the Board, stimulated by joint concerns about the frequency and extent of damage to the roofs of the building. Mr Donnelly and the official concerned surveyed the entirety of the building and concluded that the downspouts were the major points of access to the roofs. This was pointed out to them by pupils, some of whom demonstrated access. Mr Donnelly had some reluctance about installing the offending fitting, mainly on aesthetic grounds. The main concern of the Architects Department was the prevention of damage to the roof and the safety of individuals. Mr Donnelly acknowledged that the fitting was not an absolutely effective deterrent. Access could still be gained to the roofs via the protective window grills. However, the fittings proved to be reasonably successful. He considered them more a deterrent than a danger. He was unaware of any security assessment.

[16] Further evidence about the offending fitting was given by David Burgess, the Board's Senior Building Maintenance Officer, a post which he has occupied since 2000, preceded by his employment in another position in the same department. He expressed an expectation that the installation of this fitting would have been preceded by an on site security assessment. This fitting had been commonly used throughout the Board's area for at least 6 years before the accident date. It was known as "rota fencing". Its purpose was to act as a deterrent. Mr Burgess further testified that if a repair involved security issues, such as repairs to the perimeter fencing, the response time was one to two days. Repairs of this *genre* could be initiated initially by a phone call from the school, followed by a completed requisition. He described the Sacred Heart Primary School as one of the most vandalised schools in the Board's area.

[17] Dr Marrs, a consulting engineer, testified on behalf of the Plaintiff. He gave evidence about the design and dimensions of the offending fitting, which he described as a deterrent. He suggested that there are numerous roof deterrent products available on the market. His thesis was that this type of device should appear more dangerous than it actually is. The offending fitting is made of expanded metal and cut into panels by diagonal lines, thereby creating extremely sharp edges. His criticism was that the sharpness of these edges was not apparent visually. He likened the edges to a very well sharpened carpenter's chisel, with a thickness of 3 to 5 millimetres of expanded metal. The offending fitting has 30 sharp edges altogether. Dr Marrs further opined that it is an insufficient deterrent, as it is possible to bypass it on either side, by making use of the downpipe and gutter. A new additional deterrent device is now fitted to the roof and he considered this more effective. He further suggested that a warning notice such as "*WARNING: ANTI-CLIMB SPIKES*" could have been attached to the downpipe and speculated that this might have dissuaded the Plaintiff. He readily acknowledged that the offending fitting was designed to prevent vandals from accessing the roof and, consequentially, to afford them protection against injury. He accepted that the rotating horizontal spindle made access to the roof more difficult and reduced the risk of injury. He further accepted that the new device, which co-exists with the offending fitting and which he considered preferable, also carries a significant risk of injury.

[18] Mr Wright BSC, a consulting engineer testifying on behalf of the Defendant, explained that he had experienced many products such as the offending fitting. There was a substantial measure of agreement between the parties' respective consulting engineers. They disagreed mainly about the appearance of the fitting. Mr Wright was of the opinion that the edges have an evidently sharp appearance. He further testified that no British Standard or European Standard stipulated the provision of a warning sign. He described the palisade perimeter fencing as very commonplace and compliant with the special British and European Standards with regard to the component bolts and nuts. The pales, he testified, are very difficult to remove.

III FINDINGS

[19] I find on the balance of probabilities that the Plaintiff suffered his injury in the manner described by him in his evidence. I accept the essential core of the Plaintiff's testimony about the events preceding and at the time of his accident. The only real challenge to his account was based on an entry in the records of the Royal Belfast Hospital for Sick Children Accident and Emergency Department, which contains the following words:

> "*Fell over a metal fence when climbing it*".

This record further documents that the Plaintiff sustained a deep laceration to the edge of his left hand and fourth finger. The date of his attendance is recorded as 30 June 2001 (a Saturday) and the time is documented as 17.17 hours. It is further recorded that the Plaintiff was accompanied by his aunt – to whose house, the Plaintiff testified, he had fled upon discovering that there was no one in his own home. He was then conveyed to hospital by ambulance. I am satisfied that the entry in the hospital records does not confound or undermine to any material degree the Plaintiff's account of the accident.

[20] Mr Donnelly and Mr O'Labhradha were highly impressive witnesses. It is clear that they performed their duties in a responsible, attentive and assiduous fashion. I accept without hesitation their evidence about the inspections of the perimeter fencing, the steps taken to carry out repairs and the speed of repairs. I further make the following specific findings:

(a) Pupils were expressly deterred from and warned against visiting the premises outside school hours.

(b) The Plaintiff and Michael Hardy had previously been thus deterred and warned.

(c) As a matter of probability, the repairs to the perimeter fencing specified in Requisition No 165319 were duly carried out between the date of the requisition (11 June 2001) and the accident date (30 June 2001). This probably occurred in mid-June.

(d) Mr Donnelly's customary end of term inspection of the perimeter fencing was probably carried out subsequent to completion of these repairs and did not identify the need for any further repairs.

(e) Accordingly, at some point during the period of approximately 2 weeks before the accident date, the Defendant's servants and agents, by the acts and steps outlined above, satisfied themselves that the perimeter fencing was in good repair throughout.

(f) As a matter of probability, the breach in the perimeter fencing which facilitated access by the Plaintiff and his friends to the school premises on the accident date occurred very shortly beforehand, during the span of some few days.

(g) The existence of further defects in the fencing did not come to the attention of school management until 20 August 2001, when Mr Donnelly submitted a series of requisitions to the Board, which included Requisition No 165327, specifying "*to repair/replace missing palisade fencing*".

[21] I further find that the history of the offending fitting and the extent of its deployment in the Board's area are as described in the evidence rehearsed in paragraphs [15] and [16] above.

[22] I am satisfied that the offending fitting was obviously dangerous. With regard to this issue, the court is well placed to make its own assessment. The fitting is clearly depicted in a series of photographs and has been the subject of detailed description by the expert witnesses. I reject the suggestion that its dangerous character was in some way camouflaged or concealed. In my opinion, this would have been clearly evident to a boy of 12 years. I infer that the Plaintiff consciously took steps to avoid contact with the fitting on his "outward" journey and, further, that his decision to attempt a descent in close proximity to the downpipe was influenced by the presence of the fitting and the evident risk of injury which it posed to him.

IV LEGAL ISSUES – OCCUPIERS' LIABILITY ACT (NI) 1957

[23] I now turn to examine the questions of law relating to the Plaintiff's claim for damages. These concern predominantly the Plaintiff's status on the school premises at the material time and the reasonableness of the Defendant's actions relating to inspections of the perimeter fencing, repairs to the fencing, installation of the offending fitting and the deterrence of intruders.

[24] The Plaintiff's primary case is that he is entitled to succeed under the Occupiers Liability Act (Northern Ireland) 1957 ("*the 1957 Act*"). As appears from its preamble, the subject matter of the 1957 Act is –

> "*. . . the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property from dangers due to the state of the property or to things done or omitted to be done there, and for purposes connected therewith*".

As appears from Section 1(2) the Defendant must have "*occupation or control*" of the relevant premises. As indicated in paragraph [1] above, this requirement is satisfied in the present case. As further appears from Section 1(2) there must be an "*invitation or permission*" to enter or use the premises, given by the Defendant to the Plaintiff. The legal duty established by the 1957 Act is termed, per Section 2(1) the "*common duty of care*". This duty is owed by the occupier to his "*visitors*", that is to say, per Section 1(2), those invited or

permitted by him to enter or use the premises. Section 2(2) prescribes the common duty of care in the following terms:

> "*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*".

[25] The first question to be addressed is whether the activity in which the Plaintiff was engaged at the time when he sustained injury was encompassed by a purpose for which he was invited or permitted by the Defendant to use the premises. The specific activity in question was that of descending from the single storey roof to the ground below, in connection with playing a game of football. The Plaintiff does not make the case that he was invited by the Defendant to use the school premises for this purpose. Nor does he make the case that he was expressly permitted by the Defendant to do so. Rather, his case is based on a contention of implied permission (or licence). He contends that his status was that of implied licensee. On the basis of the opening submission by Mr Brian Fee QC on behalf of the Plaintiff and the closing submission by Mr Niall Hunt, the Plaintiff's case, in this respect, is founded on the contention that he Defendant knew or ought to have known of the Plaintiff's presence. The court is invited to find that the Plaintiff and his friends habitually used the premises for playing football and that the Defendant knew or ought to have known of this. It is further contended that the implied permission extended to the Plaintiff having access to and egress from the relevant roof for the purpose of retrieving the ball, it being readily foreseeable that this would occur. Thus, it is argued, the Plaintiff was acting within the limits of his implied permission when the accident befell him.

[26] Did any such implied permission exist? In ***Edwards v. Railway Executive*** [1952] AC 737, a decision which predated the enactment of the Occupiers Liability Act 1957 in England and Wales (which is framed in terms identical to the 1957 Act in Northern Ireland) and is a leading authority in this sphere, damages were claimed by a boy aged 9 who, having secured access to a railway line via a defective fence, was struck and injured by a train. He brought an action in negligence against the railway owners. The evidence established that the fence had been breached by children with some frequency for many years before the accident. When defects were observed by the Defendant's employees, repairs were duly effected. These were required with frequency. The evidence was that the fence was intact on the accident date. Lord Porter identified as the first question to be decided the issue of:

> "*. . . whether there was any evidence from which it could be inferred that children from the recreation ground had become licensees to enter the respondent's premises and toboggan down the embankment*" (page 743).

He continued:

> "*There must, I think, be such assent to the user relied upon as amounts to a licence to use the premises. Whether that result can be inferred or not must, of course, be a question of degree, but in my view a court is not justified in likely inferring it . . .*
>
> [page 744] *The onus is on the appellants to establish their licence, and in my opinion they do not do so merely by showing that, in spite of a fence now accepted as complying with the Act requiring the respondents to fence, children again and again broke their way through. What more, the appellants asked, could the respondents do? Report to the Corporation? But their caretaker knew already. Prosecute? First you have to catch your children and even then would that be more effective?* ***In any case I cannot see that the respondents were under any obligation to do more than keep their premises shut off by a fence which was duly repaired when broken and obviously intended to keep intruders out".***

[Emphasis added].

. . .

Continuing, Lord Porter emphasised that a licence is not to be inferred on the ground that every possible step to keep intruders out has not been taken. These passages clearly convey that an occupier's conduct, in this respect, is to be evaluated by the standard of reasonableness.

[27] In the same case, Lord Goddard, in a celebrated passage, stated [at page 746]:

> "*But repeated trespass of itself confers no licence; the owner of a park in the neighbourhood of a town probably knows only too well that it will be raided by young and old to gather flowers, nuts or mushrooms whenever they get an opportunity. But because he does not crown his park wall with a chevaux de friese or post a number of keepers to chase away intruders how is it to be said that he has licensed what he cannot prevent? . . .*
>
> [Page 747) *Now, to find a licence there must be evidence either of express permission or that the landowner has so*

> *conducted himself that he cannot be heard to say that he did not give it."*

Lord Oaksey, for his part, stated [at page 748]:

> "*In these circumstances the question appears to me to be whether there was evidence from which it could reasonably be inferred that the respondents acquiesced in this use of the embankment by children from the recreation ground. In my opinion, in considering the question whether a licence can be inferred, the state of mind of the suggested licensee must be considered. The circumstances must be such that the suggested licensee could have thought and did think that he was not trespassing but was on the property in question by the lease and licence of its owner".*

He continued [at page 749]:

> *"The only way in which the appellants argument can, in my opinion, be put is to suggest that although they knew of Griffiths warnings and Griffiths' repairs to the fence, they did not know and had no reason to think that the respondent authority objected."*

He dismissed this argument. Their Lordships were unanimous that an inference of acquiescence and, hence, a finding of implied permission on the part of the respondent authority could not be made.

[28] Having regard to the findings in paragraphs [20] above, I conclude that the Plaintiff's status on the premises at the time of the accident was not that of an implied licensee. I treat this as a fact sensitive question and I acknowledge that the decision in ***Edwards v. Railway Executive*** must be considered in the context of its particular factual matrix. With that acknowledgement, I remind myself of Lord Porter's injunction that an implied licence is not to be lightly inferred. I hold that in this case a licence is not to be inferred by the occasional previous use of the school premises by children for the playing of football outside school hours and terms. In accordance with Lord Oaksey's approach, I take into account the admitted state of mind of the Plaintiff, who knew that he was not welcome on the school premises. Further, I find that the conduct of the Defendant's servants and agents was at all times inconsistent with acquiescence, or tolerance. It constituted, rather, positive discouragement of and opposition to this type of intrusion and I find that the deterrent measures taken by the Defendant were reasonable. In the light of my findings, the conclusion that the Plaintiff did not have the Defendant's implied permission to play football or to be on or descend from the roof in question follows

inexorably. He was not, therefore, a lawful visitor and cannot sue under the 1957 Act.

[29] If I had held that the Plaintiff had the Defendant's implied permission to play football on the school premises outside normal school hours, I would have held further that such permission extended to getting on to the roof for the purpose of retrieving the ball and descending there from thereafter. My approach in this respect may be compared with that of Lord Goddard in ***Edwards***, who would not have been prepared to "*distinguish between the embankment itself and the railway lines which run along the top of it*" [at page 747]. In the present case, the ingredients in the mix included a large group of young boys, a hard playing surface, a bouncing ball, no conventional goalposts and a proximate single storey roof so designed (as agreed between the consulting engineers) that a stray ball could be trapped in the recess above the double doors. Games of football played in such circumstances and having these characteristics do not possess readily ascertainable limitations and boundaries, physical or otherwise. To these factors one must add that of youthful exuberance. These considerations impel me to hold that had an implied licence (or permission) existed it extended to the activity in which the Plaintiff was engaged when he sustained his injury.

[30] If, contrary to my holding above, the Plaintiff had established that he was a lawful visitor at the material time, by dint of an implied licence, it would have been necessary for me to consider whether the Defendant's servants and agents had taken such care as in all the circumstances of the case was reasonable to see that the Plaintiff would be reasonably safe in using the premises. Having regard particularly to the findings which I have made in paragraphs [20] and [21] above, I would have resolved this issue in the Defendant's favour. The case which the Defendant had to meet, in this respect, related to the installation and appearance of the offending fitting. In my opinion, the Defendant acted reasonably, following advice from the Board's Architects Department, in installing this device and maintaining it in position. I have already rejected the central complaint advanced on behalf of the Plaintiff, which was to the effect that this device, by its design, appeared innocuous and was capable of deceiving the unsuspecting. The Plaintiff has failed to satisfy me of this. I further reject the criticism by the Plaintiff's consulting engineer that a warning sign should have been provided. This was not to be expected of the hypothetical reasonably prudent occupier and I refer also to my findings in paragraph [38], infra.

[31] If I had found in the Plaintiff's favour on all of the issues outlined above, it would have been necessary for me to consider the question of contributory negligence. On the probabilities, it seems to me that the Plaintiff was attracted to attempting his descent at the point in question by the presence of the downspout. This was the only downspout of which he could have availed. It was an obvious prop, an available aid. To descend by one of the protective

grills fitted to the three windows situated between the downspout and the recess where the ball had become trapped would have been less attractive and probably more risky. No safer alternative was available to the Plaintiff. In sustaining his injury, the Plaintiff was guilty of, at most, a slight misjudgement and/or momentary inattention. Regard must also be had to Section 2(3)(a) of the 1957 Act, which distinguishes between children and adults. Further, the Plaintiff's conduct would, on this hypothesis, have been an authorised user of the premises. The essence of contributory negligence is a failure to take reasonable care for one's safety, thereby contributing to the injury or damage suffered: see the discussion in ***Clerk and Lindsell on Torts*** [19th Edition, paragraph 3-50]. I would have declined to find the Plaintiff guilty of any contributory negligence in the circumstances.

V <u>OCCUPIERS' LIABILITY (NI) ORDER 1987</u>

[32] Finally, it is incumbent on me to address the Plaintiff's alternative case, which was predicated on a finding that he would fail to establish liability under the 1957 Act. In such event, it was contended that the Plaintiff should recover damages on the basis that the Defendant owed him a duty under Article 3 of the Occupiers Liability (Northern Ireland) Order 1987 ("*the 1987 Order")* and was guilty of a breach of such duty in the circumstances.

[33] Article 3 of the 1987 Order provides:

> *" 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 1993, and

> *(b) any other road or way over which there exists a public right of way;*
> *''injury'' means anything resulting in death or personal injury, including any disease and any impairment of physical or mental condition; and*
> *''movable structure'' includes any vessel, vehicle or aircraft."*

[34] In considering the Plaintiff's alternative case under the 1987 Order, and bearing in mind that this is couched in terms identical to the Occupiers Liability Act 1984, I have had regard to the decision of the House of Lords in ***Tomlinson v. Congleton Borough Council and Another*** [2004] 1 AC 46 and the decisions of the English Court of Appeal in ***Ratcliff v. McConnell and Others*** [1999] 1 WLR 670 and ***Donoghue v. Folkestone Properties Limited and Another*** [2003] QB 1008. In ***Donoghue,*** paragraphs 33-35 in the judgment of Lord Phillips MR and paragraphs 69-72 and 78 in the judgment of Brooke LJ are especially noteworthy. Further, as emphasised by Lord Hoffman in ***Tomlinson*** [paragraph 13]:

> "*The duty under the 1984 Act was intended to be a lesser duty, as to both incidence and scope, than the duty to a lawful visitor under the 1957 Act. That was because Parliament recognised that it would often be unduly burdensome to require landowners to take steps to protect the safety of people who came upon their land without invitation or permission. They should not ordinarily be able to force duties upon unwilling hosts*".

As Lord Hoffman further observed, where this reduced duty is proved to exist, it is "*rarer and different in quality from the duty which arises from express or implied invitation or permission to come upon the land and use it*". I have also drawn on the analysis in paragraphs 25-50 of Lord Hoffman's opinion.

[35] The first question which I must determine is whether the duty under Article 3(4) was owed, bearing in mind that it is not in dispute that the Defendant and those whom he represents are properly to be considered occupiers of the school premises. Accordingly, I must consider whether the three qualifying conditions for the existence of the occupier's duty, prescribed in Article 3(3), are satisfied. All of these conditions must be satisfied in order to establish the existence of the duty.

[36] The first qualifying condition is that the occupier is aware of the danger in question or has reasonable grounds to believe that it exists. This condition can be satisfied only where there exists, in the language of Article 3(1)(a), "*a danger due to the state of the premises or to things done or omitted to be done on*

them". Further, this must, of course, be the operative danger. I hold that the offending fitting constituted a danger, having regard to its design characteristics, its juxtaposition to the downspout and its position on a single storey roof in immediate proximity to a play area. By virtue of this combination of factors, the fitting constituted a danger. Further, the Defendant's servants and agents were plainly aware of its existence. Accordingly, the condition enshrined in Article 3(3)(a) is satisfied.

[37] The second qualifying condition is that the Defendant's servants and agents knew or had reasonable grounds to believe that the Plaintiff was in the vicinity of the danger concerned or may come into its vicinity. Did the Defendant's servants and agents know or have reasonable grounds to believe that the Plaintiff was actually in the vicinity of the danger concerned at the material time? In my opinion, there is no evidence from which such actual or constructive knowledge could be inferred. However, the alternative question which must be posed is whether the Defendant's servants and agents knew or had reasonable grounds to believe "*that* [the Plaintiff] *may come into the vicinity of the danger".* Having regard to the evidence of Mr Donnelly rehearsed at the beginning of paragraph [12] above, and the related evidence of Mr O'Labhradha noted in paragraph [14], I find that the Defendant had reasonable grounds to so believe. The Plaintiff was a member of the kind of class contemplated by Lord Phillips MR in ***Donoghue,*** paragraph [41].

[38] The third test to be applied is whether the risk was "*one against which, in all the circumstances of the case,* [the Defendant] *may reasonably be expected to offer* [the Plaintiff] *some protection".* In this context, the "risk" is, by virtue of Article 3(1)(a), a risk of the Plaintiff suffering injury by reason of the danger concerned. In my judgment, this issue must be resolved against the Plaintiff. The Plaintiff's consulting engineer made no convincing case against the Defendant in this respect. He did not identify any protection against contact with the offending fitting which could or should have been provided in the circumstances. I have held that the Plaintiff's injury was sustained as a result of his left hand coming into contact with the fitting. The risk of such contact could in theory have been prevented, or reduced, by the provision of some kind of barrier. Such elaborate steps could not reasonably have been expected of the Defendant in the circumstances. The fitting was itself a barrier and it is common case that it operated as a deterrent. I have held that the risks which it posed upon contact were obvious. The Plaintiff's consulting engineer did suggest that a warning sign might have been erected. However, bearing in mind my findings in paragraphs [21] and [22] above, I hold that this measure could not reasonably have been expected of the Defendant in the circumstances. It was not required or recommended or even suggested by any relevant guideline or standard. Thus the Plaintiff fails at the third, and final, hurdle.

[39] Accordingly, I conclude that the Plaintiff has failed to establish that the qualifying condition in Article 3(3)(c) of the 1987 Order is satisfied. It follows that the Defendant did not owe the Plaintiff the duty enshrined in Article 3(4).

[40] If I had held that the Defendant did owe the Plaintiff the duty prescribed in Article 3(4), it would have been necessary for me to consider whether the Defendant had taken "*such care as is reasonable in all the circumstances of the case to see that* [the Plaintiff] *does not suffer injury on the premises by reason of the danger concerned*". Having regard to the findings made in paragraphs [20] to [22] above, I would have resolved this issue in the Defendant's favour. It is unnecessary to repeat those findings here.

[41] I would add that where, as here, a plaintiff seeks to promote alternative cases under the 1957 Act and the 1987 Order, a finding that the Defendant was not in breach of the common duty of care owed under the 1957 Act (as in paragraph [30] above) would appear, logically, to preclude any possibility of a finding that the occupier was nonetheless in breach of the duty owed under Article 3(4) of the 1987 Order, given that the former duty is more stringent than the latter: see per Lord Hoffmann in ***Tomlinson*** (paragraph [34], supra) and per Brooke LJ in ***Donoghue***, paragraphs [71] to [72] and [78] especially, quoting from the Law Commission Report in 1976 (Law Com. No 75, Cmnd 6428), which informs the background to and philosophy of the 1984 Act (and, hence, the 1987 Order).

III CONCLUSION

[42] Had I found in the Plaintiff's favour I would have awarded £30,000 damages for pain and suffering and loss of amenity, past and future. To this I would have added £15,000 to compensate the Plaintiff for loss of earning capacity arising out of the disadvantage which he suffers and will suffer in the employment market, applying the approach of the English Court of Appeal in ***Smith v. Manchester Corporation*** [1974] 17 KIR 1, (per Edmund Davies LJ, "*an existing and permanent reduction in earning capacity*" and, per Scarman LJ, "*the weakening of the Plaintiff's competitive position in the open labour market*"). There was no claim for special damage. Accordingly, I would have awarded the Plaintiff total damages of £45,000.

[43] There will be judgment for the Defendant against the Plaintiff. The parties' respective counsel have already acknowledged, realistically and helpfully, that costs should follow the event. Accordingly, subject to any further submission, there will be an order for costs in favour of the Defendant against the Plaintiff, subject to the usual stay, given that the Plaintiff has the status of a legally assisted person. If any different order is proposed by either party, I shall hear argument.

[44] Finally, I confirm that I granted leave to the Plaintiff to serve an amended Statement of Claim on the second day of trial, principally in order to reflect his alternative case under the 1987 Order.