

Neutral Citation No. [2016] NIQB 16

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

Delivered: 16/02/2016

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2011/112154

BETWEEN:

MAURICE WEIR

Plaintiff;

-and-

THE COUNTRYSIDE ALLIANCE LIMITED

Defendants.

McBRIDE J

**Introduction**

[1] In the County Armagh, in the townlands of Kinnego and Grange, gentlemen belonging to the Kinnego, Grange and Canary Hunt Club ("Hunt Club"), go hunting with hounds every Saturday from 1 October to St Patrick's Day and also on Wednesdays, weather permitting.

[2] The plaintiff, a pigeon fancier resided at 56B Kinnego Road where he kept both adult and young pigeon stock. He alleges that on 7 February 2009 a number of hounds belonging to the Hunt Club gained entry to four of his lofts and aviaries killing 59 pigeons and injuring a number of other pigeons. The incident caused the plaintiff distress and upset.

[3] The plaintiff claims damages against the defendant for the loss of his pigeons, consequential loss, costs of repairing aviaries together with damages for distress and injury to feelings; on the basis that the Defendant was either negligent in and about the management, care and control of its dogs on the 7 February 2009 and or acted in breach of statutory duty as set out in Articles 29 and 53 of the Dogs (NI) Order 1983

and Article 8 of the Animals (NI) Order 1983 by allowing its dogs to damage livestock and or the defendant committed a trespass to lands and goods by reason of its dogs entering onto the plaintiff's lands and causing damage to his pigeons and aviaries.

[4] The defendant accepts that it is vicariously liable for the actions of the Hunt Club and by agreement it was named as the only defendant in the action. The defendant defends the claim on the basis that:-

- (a) At the time of the alleged incident the plaintiff was a member of the Hunt Club and therefore his claim is unsustainable.
- (b) The plaintiff's claim is fraudulent as the alleged incident did not occur.
- (c) The claim for loss and damage, if sustainable is fraudulently exaggerated.

[5] Given the nature of the defence few matters were agreed. It was however accepted by the defendant in reply to interrogatories that the Hunt Club had arranged a hunt on the day in question. It was a fox hunt where huntsmen followed on foot. The parties responsible for the management of the hunt were Jack Irwin and Jim Willis.

[6] The hearing of this action proceeded over a number of weeks. Given the nature of the defence most court time was spent testing the credibility of the plaintiff and his witnesses. The plaintiff was represented by Mr Michael Stitt QC and Mr Trevor Ringland and the defendant was represented by Mr David Ringland QC and Mr Michael Maxwell. I am grateful to all counsel for their detailed and helpful submissions.

### **Relevant Legal Principles**

[7] It was accepted by all parties, that if the plaintiff's version of events was accepted then the defendant would have acted both negligently and in breach of statutory duty. Further the acts would constitute both trespass to goods and land.

### **Measure of damages**

[8] All counsel accepted that when goods are destroyed by the wrongful acts of a defendant the plaintiff is entitled to the market value of the goods, as of the date of the trespass together with any special loss which flows naturally and directly from the wrong, that is, consequential loss.

[9] Consequential loss may encompass non pecuniary interests such as inconvenience and distress at being deprived of one's property. Examples of cases in which such damages were awarded include, Graham v Voigt [1989] 89 ALR 11

where damages were awarded for the distress suffered by a keen philatelist at the loss of his stamp collection and King v Gross [2008] 443 ALR 11 where damages were awarded for sentimental loss suffered as a result of kidnapping and sterilising of the claimant's prize dog.

[10] Where damage is caused to land, the plaintiff is entitled to recover the costs of repair, where the expenditure is reasonable and the works have actually been carried out.

[11] During the course of the proceedings the Plaintiff sought to amend his statement of claim to include a claim for aggravated damages. Counsel for the Defendant objected on the basis that aggravated damages are not recoverable where a claim is brought for negligence, breach of statutory duty and trespass. It is clear from dicta of Woolf J in Kralj v McGrath [1986] 1 All ER 54, that aggravated damages are not recoverable for the tort of negligence. At paragraph [61] he said,

“It is my view that it would be wholly inappropriate to introduce into claims of this sort for breach of contract and negligence, the concept of aggravated damages.”

[12] Further it appears that aggravated damages are not recoverable for a claim based on breach of statutory duty and no authority was cited in which such damages were awarded. Clerk and Lindsell On Torts, 28<sup>th</sup> Ed at paragraphs 17.107 and 19.70 confirm that aggravated damages can be awarded in cases involving trespass to land and goods. Such damages however only lie where the trespass is particularly high handed, insulting, or involves oppressive conduct.

### **Issues to be determined**

[13] To determine whether the plaintiff has a valid claim it is necessary to consider a number of questions:-

- (i) Was the plaintiff a member of the Hunt Club as of 7 February 2009?
- (ii) Did the alleged incident occur?
- (iii) If it did occur, what loss did the plaintiff sustain and in particular is the plaintiff entitled to aggravated damages?

**Question 1 - Was the plaintiff a member of the Hunt Club on 7 February 2009?**

[14] The plaintiff gave evidence that he had originally been a member of the Hunt Club but his membership ceased in 2008 when he stopped attending meetings and paying membership fees.

[15] In cross examination David Ringland QC referred the plaintiff to a "Liability Report for Countryside Alliance Members" which the plaintiff had completed, signed and dated 24 February 2009 and to a letter sent by the defendant to the plaintiff dated 21 November 2008 which confirmed his membership and enclosed a membership card. It was put to the plaintiff that completion of this form and receipt of the letter proved membership. This was denied by the plaintiff who denied receipt of the letter dated 21 November 2008 and pointed out that the address on the letter was not his address.

[16] When Mr Irwin, Treasurer of the Hunt Club gave evidence he accepted in cross-examination, after the relevant documents were shown to him, that the plaintiff had not paid membership fees since 2007. The letter dated 21 November 2008 stated that when payment was not made or when payment by cheque, credit card, debit card or direct debit failed to clear, "membership will be invalidated". Thus payment of membership fees was a prerequisite to membership. As the plaintiff had not paid membership fees for the relevant period I find that he was not a member of the Hunt Club at the relevant time. The fact that the plaintiff filled in a claim form for members does not change the reality of the situation. I have no doubt that the insurers for Countryside Alliance would have refused to indemnify him on this basis if he had proceeded to make a claim.

[17] Having found that the plaintiff was not a member of the Hunt Club it is unnecessary to consider the interesting legal question, in what circumstances can one member of an unincorporated association sue another member or officer of the Club?

**Question 2 - Did the incident alleged by the plaintiff occur?**

[18] The plaintiff gave evidence in which he recalled the events of 7 February 2009 in some detail. On that day he was with Mr Calvin vaccinating his pigeons. A number of others were present at his premises including Mr Henning, Mr Nooney and Gerald Weir, son of the plaintiff. After lunch at 1.30 pm approximately the plaintiff and the others came into the yard. The plaintiff saw about 15 hounds, some inside and some outside the aviaries. He saw a large number of dead and injured pigeons lying on the ground. He witnessed hounds holding pigeons in their mouths, heard crunching noises and saw two hounds pulling a pigeon apart. He attempted to chase the dogs off and then tended the injured birds. At this time he saw Mr Irwin and Mr Willis, who were both known to him standing in a field some 400 metres away. He heard them calling for the hounds. When the plaintiff shouted at Mr Irwin and Mr Willis they turned their backs and walked away. The plaintiff

then lifted the dead birds and put them in his freezer. He reported the matter to the police and left a message for the dog warden that day.

[19] The plaintiff's evidence was corroborated by the oral evidence of Mr Calvin and Mr Gerald Weir. Mr Calvin gave evidence that he had been present at the plaintiff's premises vaccinating the pigeons. When he came out after lunch he saw 8 to 10 hounds rounding around. He saw "dead pigeons all over the place". He also witnessed "hounds with pigeons in their mouths".

[20] Mr Gerald Weir stated that he saw six hounds running around the aviaries. He saw a lot of pigeons killed including baby pigeons. He heard the huntsmen "call" but noted that this had little effect on the hounds as they remained running around the yard and aviaries.

[21] Mr Nooney, on the grounds of ill-health and Mr Henning, as he was out of the jurisdiction did not give oral evidence. Both made statements which were served under the Civil Evidence (Northern Ireland) Order 1997. Each corroborated the plaintiff's version of events.

[22] In contrast Mr Willis and Mr Irwin on behalf of the defendant gave evidence denying that the hounds were ever near the plaintiff's premises on the day in question. They described an initial fox hunt which lasted for only a few minutes. At no time did the hunt come near the plaintiff's premises. Thereafter the hunt hunted a number of hares until 3pm - 3.30pm. Both huntsmen were adamant that none of the hunts was in the vicinity of the plaintiff's premises and denied that the hounds caused any damage as alleged.

[23] To resolve the differences between the two versions of events it is necessary to consider the credibility of the plaintiff and his evidence.

### **Plaintiff's credibility**

[24] In Thornton v NIHE [2010] NIQB 4 Gillen J at paragraphs [12] and [13] set out some principles for assessing credibility,

"[12] Credibility of a witness embraces not only the concept of his truthfulness, i.e. whether the evidence of the witness is to be believed but also the objective reliability of the witness i.e. his ability to observe or remember facts and events about which the witness is giving evidence.

[13] In assessing credibility the Court must pay attention to a number of factors which, inter alia, includes the following:-

- The inherent probability or improbability of representations of facts
- The presence of independent evidence tending to corroborate or undermine any given statement of fact
- The presence of contemporaneous records
- The demeanour of the witnesses e.g. does he equivocate in cross examination
- The frailty of the population at large in accurately recollecting and describing events in the distant past
- Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication
- Does the witness have a motive for misleading the court
- Weigh up one witness against another.”

[25] The main plank of the defendant’s case is that the plaintiff has made up the entire case and then forged documents to support a fraudulent claim. The defendant submitted that the plaintiff lacked credibility because of:

- (a) Inconsistencies in the documentation produced by him to the court.
- (b) Concealment of documents from the court.
- (c) His failure to call a number of witnesses
- (d) Inconsistencies in his oral evidence
- (e) His demeanour

**(a) Inconsistencies in documentation**

[26] The defence highlighted a number of inconsistencies which appeared in a number of documents including a liability report form, report to dog warden and invoices.

**Liability Report Form**

[27] The Defence referred to a Liability Report Form which had been signed by the plaintiff and dated 24 February 2009 and highlighted differences between its contents and the content of other documents and the plaintiff’s oral evidence in respect of; the time of the incident; the number of birds which were killed; whether

the matter was reported to the police and if so when; the damage caused to the lofts and the identity of the persons who witnessed the incident.

[28] **Time of incident** - There was a difference between the time given for the incident in the report form namely, 2.40pm and in the plaintiff's oral evidence, namely 1.30 pm approximately. In my view, the difference in timing does not demonstrate fraud. Rather the difference in remembering the time of the incident is consistent with the frailty of the population at large in accurately recalling the time of an event several years later.

[29] **Number of dead birds** - Much was made of the fact the claim was originally made for 49 rather 59 dead birds. The plaintiff explained that 49 was the original count as a number of the injured birds died later. He stated it was difficult to be precise about the exact number of pigeons killed as they were left "in bits and pieces". Having looked at the photographs of the dead pigeons I am satisfied that it would have been very difficult to accurately assess the number of dead birds as most were ripped into tiny pieces. I also accept that some of the birds died after the initial count was made by the plaintiff. I further note that the statement of claim said "at least 49" thus indicating that this was not a precise figure. In addition Mr Calvin in his evidence was clear that Mr Weir had initially told him when he was instructed that 59 pigeons had died and when he referred to 49 in his report this was a typing error on his part. For these reasons I do not find that the plaintiff lacked credibility when he said in evidence that 59 birds died.

[30] **Report to police**- It was put to the defendant he was lying when he said he reported the matter to the PSNI on 7 February as the police occurrence report referred to a report being made on 8 February. The plaintiff said he made a report on both the 7 and 8 February. No evidence was produced to prove that a report had not been made on 7 February. The defendant could easily have called a police officer or produced documentation to establish this fact. I therefore do not find any inconsistency between the plaintiff's oral evidence and the police documentation produced to the court.

[31] **Damage to lofts** - The plaintiff did not claim compensation for damage to the loft in the liability form. The Plaintiff stated this was because the majority of damage was done to the aviaries. I accept the veracity of this in light of the repair accounts provided by him.

[32] **Witnesses** - The plaintiff accepts that in the Liability Form he only named two witnesses. The defendant alleged that this showed he had made up the names of other witnesses to give dishonest evidence on his behalf. Having looked at the Form I note that the space only allows for two witnesses to be named. The plaintiff gave evidence that he did not want to name someone as a witnesses until he knew the person was prepared to make statement. At the time he filled in the Form only the 2 named witnesses had indicated such an intention. I accept this explanation as truthful. Taking all the alleged inconsistencies into account in the Liability Report

Form I find that they have been adequately explained by the plaintiff and do not demonstrate that he is dishonest or fraudulent.

### **Report to Dog Warden**

[33] The plaintiff gave evidence that he reported the incident to the Dog Warden on 7 February 2009. The defence called Mr Swift, a senior environmental officer with the local council (who had responsibility, inter alia, for dog control) who gave evidence that the records showed a report had been made on 2 April 2009 by the plaintiff reporting an incident which had occurred on 2 February 2009. He confirmed that he had checked the records and there was no incident reported on 2 February 2009. He confirmed however that he had not made a search as to whether a complaint had been on 7 February 2009.

[34] The plaintiff's case at all times was that the incident occurred on 7 February and that he had reported this matter to the Dog Warden on the same day. On balance, I find that the reference in the local council documentation referring to a complaint made on 2 February 2009 was in fact a typing error and should have referred to 7 February 2009. As Mr Swift did not carry out a search to ascertain if a complaint had been made on 7 February 2009 there is no evidence of inconsistency in the evidence given by the Plaintiff that he reported the matter on 7 February to the dog warden.

### **Invoices**

[35] The defendant alleges that the invoices produced to the court by the plaintiff for repair work to his lofts and aviaries are forgeries.

[36] Mr Jonathan Harty who carried out the works of repair, gave evidence. He is a professional jockey and in his spare time is a self-employed "handy man". He accepted that he was someone who was not good at paperwork and generally only accepted cash for work done and for this reason was known locally as "Johnny Cash". He did however accept that invoices were produced by his office and he confirmed that the plaintiff had purchased the necessary materials to repair the lofts and aviaries and then paid £800 to him for his labour charges for carrying out the works of repair.

[37] Whilst there were many respects in which the documentation provided to the court for the costs of repairs was confusing and would have raised suspicions, I find that all the inconsistencies were adequately addressed in evidence. I find that the documents were not forgeries. They were generated by Mr Harty's office. I further found Mr Harty to be a straightforward and honest witness who had no motive to mislead the court. I therefore find that the plaintiff did pay for the materials to carry out the repair works and that he paid Mr Harty £800 for his labour costs.

## **b. Concealing documents from the court**

[38] The defence allege that the plaintiff failed to produce a number of documents to the court and this is evidence of dishonesty. It is submitted that he failed to produce, stock book, breeding cards, handwritten valuation reports, rings for the dead birds and racing records. Evidence was given by Mr Robinson, a consultant ornithologist who had extensive experience in wildlife criminal investigations. He gave evidence that all the relevant documentation had not been supplied by Mr Weir and there were a number of outstanding documents. He accepted that the availability of some of the documentation depended on how good the breeder was at keeping records but stated fraud remained one possible explanation.

[39] It is clear from the evidence of a number of witnesses that the plaintiff was a poor record keeper. He was not professionally organised. I find that he did his best to produce what he could to the court. I accept that he did not keep a stock book. The other handwritten records were discarded when the reports were typed up. The Plaintiff only produced some bird rings as many were missing as they were eaten or destroyed by the dogs. He also produced, when requested, documentation in relation to vaccination. I therefore do not find that he deliberately concealed documents from the court.

## **c. Failure by the plaintiff to call a number of witnesses**

[40] The defence make the case that the plaintiff failed to call a number of witnesses and asks the court to draw an adverse inference from this. In particular the defence point to the failure by the plaintiff to call his solicitor to explain the contents of the liability form; his failure to call the PSNI to prove when he made a complaint; his failure to call his brother Colin Weir to confirm he had not stated that the plaintiff had killed the pigeons himself and his failure to call the Dog Warden, about the date of his complaint.

[41] The plaintiff gave a credible explanation why his brother was not called and I accept that he did not call his solicitor because the incident occurred over seven years ago and her ability to assist the court would therefore be limited. It was not for the plaintiff to call the other witnesses. If the defendant wished to make a case that he was being dishonest in respect of these matters then the burden was on the defence to prove this and if necessary it was a matter for them to call the relevant witnesses. I therefore do not make an adverse inference in relation to the plaintiff's failure to call these witnesses.

## **d. Inconsistencies in oral evidence**

[42] The defendant cross-examined the plaintiff at length about the incident and made much play of the fact that the plaintiff changed his evidence about the number of hounds in each aviary and the total number of hounds present at the premises. I

note that the plaintiff did change his evidence about the number of hounds in the vicinity from 20 to 15 or 16. In my view this does not demonstrate that he was being dishonest. The incident was obviously very distressing to the plaintiff. When he emerged from the house he saw a pack scurrying around his yard and if he had been very precise about the number of hounds I would have viewed this with more suspicion.

[43] The plaintiff was further cross-examined about inconsistencies between his evidence and that of other witnesses as to who had chased the dogs and who had lifted the dead birds. The plaintiff gave evidence that he alone had carried out these tasks. Other witnesses had indicated that they had also chased the dogs and lifted dead pigeons. Again I find that nothing turns on this. The plaintiff may not have seen others carrying out these tasks as he himself was focusing on chasing the dogs away and tending to dead or injured pigeons.

[44] The plaintiff was further cross-examined about not recalling complaints he had made to the Dog Warden about incidents which had occurred since the subject incident. The plaintiff accepted he did not mention these complaints but said "my mind is coming back" and when asked he was able to give details about subsequent incidents. He explained that he did not mention these complaints when asked initially as he was focusing on the actual incident. Having observed the plaintiff give evidence, I noted that he appeared very stressed and pressurised in the witness box. He focused intensely on the incident and as he was concentrating on it so much he failed sometimes to carefully listen to questions which related to other matters and as a result did not answer the question asked. I do not however find that he presented as dishonest.

#### **e. The plaintiff's demeanour generally**

[45] I observed and listened to the plaintiff over a number of days. I found that he was a witness who did not always listen carefully to the question and frequently answered a different question. When he listened carefully he was able to give credible evidence. The plaintiff was cross-examined at length over a number of days and it was obvious from his demeanour that he found this a very stressful experience. I formed the impression that the plaintiff was an honest and straightforward witness. This was strengthened by the fact that sometimes he volunteered information which was not always advantageous to his claim, for example he volunteered evidence that the cost of repairs would have led to betterment and indicated that therefore there should be a reduction in the compensation due. Further when he produced vaccination sheets during the course of the hearing he indicated to the court that "he brought it as it was". The document was incomplete and as such could have been used against him. The fact he failed to fill in the missing details, which he could have done without anyone knowing, indicates again that he was an honest witness.

[46] In addition to the subjective view I have formed of the plaintiff I now turn to consider other factors which objectively assess the reliability of the plaintiff's evidence.

### **Corroboration by other witnesses**

[47] There were a number of witnesses who gave independent evidence which largely corroborated the plaintiff's version of events. Mr Calvin and Mr Gerald Weir gave evidence corroborating his evidence and two other witnesses made statements which supported the plaintiff's claim that hounds belonging to the defendant killed and injured his pigeons and damaged his aviaries. Mr Calvin and Mr Gerald Weir were cross-examined at length. Both however were unswerving in stating that the incident did occur and that they witnessed it. Nothing was suggested to indicate that they have anything to gain by supporting the plaintiff or that they were being manipulated by him.

[48] The defence called a number of witnesses in an attempt to undermine the credibility of these witnesses. Mrs Weir alleged that Mr Calvin was a close friend of the plaintiff's and had given evidence in another court case on his behalf. She further stated that Gerald Weir would have been busy on Saturdays and she therefore found it hard to understand how he could have been away from his business and present at plaintiff's premises on the day of the incident. She could not however say that he was not there. I did not find Mrs Weir to be a credible witness. She had earlier disrupted proceedings by shouting out, whilst Mr Calvin was giving evidence that he was a liar when he said he did not give evidence at another court for the plaintiff. Later when she gave her evidence she had to admit that she had been mistaken in her belief that he had given such evidence. She was a witness who had an axe to grind. She was divorced from the plaintiff and has on-going proceedings against him. It transpired that she had volunteered to come to court to give evidence against him as she wanted to "destroy his claim". I therefore have no regard to the evidence she gave.

[49] Mr Willis, who gave evidence on behalf of the defence accepted that he had been standing with Mr Irwin at the point where the plaintiff said he was standing. I find that this is further corroboration of the plaintiff's evidence.

[50] There are therefore a number of witnesses who corroborated the plaintiff's version of events and their evidence was not undermined.

[51] In seeking to assess the probability or improbability of the incident occurring, it is necessary to consider 3 further questions:-

- (a) Were the hounds in the vicinity of plaintiff's premises on 7 February 2009?

- (b) Could and did the hounds gain entry to the plaintiff's lofts and aviaries?
- (c) Did the hounds kill and injure the plaintiff's pigeons.

**a. Were the hounds in the vicinity of the plaintiff's premises on 7 February 2009?**

[52] In reply to the interrogatory "what was the precise route of the hunt" the defendant responded:

"The hunt started at the Kinnego Sabbath School building on the Tirnacronnon Road. .... It continued until we came to just short of the Grange Blundell Road. At this point the fox went to earth and we abandoned hunt."

[53] The interrogatories indicated that the fox hunt ended without incident. They suggest that once the fox went underground the hunt was abandoned. However when Mr Irwin and Mr Willis gave evidence it transpired the fox hunt ended after a very short time and thereafter huntsmen were involved in hunting hares until 3.00 or 3.30 pm.

[54] During cross examination both Mr Irwin and Mr Willis volunteered that a fox hunt normally runs in a straight line. In this area a straight run would take the fox through or close to the plaintiff's premises and across the busy Moy road. On the day in question cars belonging to the hunt were deployed to the Moy Road to keep dogs from crossing it and cars belonging to the hunt were also moved from the starting point at the Sunday school to the Kinnego Road close to the plaintiff premises. Mr Willis admitted that he was standing with Mr Irwin at the point where the plaintiff said they were standing some 400 metres from his premises. On the basis of these facts, I find that the hunt was in the vicinity of the plaintiff's premises on 7 February 2009. This is the only explanation for the positioning of the cars and the only reason why Mr Willis and Mr Irwin were standing in a field some 400 meters from the plaintiff's premises.

[55] I further find that neither Mr Willis nor Mr Irwin can be clear about the exact whereabouts of the hounds. Both of them and their expert witness Mr Scull, a professional gamekeeper, accepted that hounds can be out of sight for some time. Mr Irwin said they could be out of sight for five minutes. He conceded that the hounds could be several fields ahead of huntsmen and conceded that viewing was made difficult by "big thorn ditches". Mr Willis stated that the huntsmen used "walkie talkies" as the dogs were out of sight "most of the time". When dogs go out of sight the huntsman "call" them. It is significant that both the plaintiff and his son

Gerald Weir heard the huntsmen call at the time when the hounds were on the plaintiff premises.

[56] The plaintiff gave evidence that when the huntsmen heard the plaintiff calling them, they simply turned their backs and walked away. When Mr Irwin gave evidence he said the plaintiff could not prove the hounds went on to his premises "as he never got a photograph of the dogs on his premises". This however is not the test and I find that Mr Irwin's denial that the dogs went onto the plaintiff's premises is based on this false premise and he is using this to hide behind the fact that he is unable to say precisely where his hounds were at the time of the incident.

[57] On the basis of all these facts I find that at the relevant time the hounds were out of sight of the huntsmen and were in fact on the premises of the plaintiff.

**b. Did the hounds gain entry to the plaintiff's lofts and aviaries?**

[58] The plaintiff, his son Gerald Weir and Mr Jonathan Harty all gave evidence that the wire in the aviaries was ripped from the bottom and sides and had been pushed up by the hounds thus enabling them to enter the aviaries. They also gave evidence that the wooden slats of the racing loft had been "gnawed" and this is how the dogs had gained entry to the loft. Dr Scullion, a veterinary surgeon said that he had witnessed on a number of occasions hounds ripping similar and even stronger wire and he accepted the hounds were capable of gaining entry in this way.

[59] The defence denied that the hounds were capable of ripping and pushing up the wires as described. In particular they relied on the expert evidence of Mr Scull, a gamekeeper, who said it would require considerable force to rip and pull the wire apart. Mr McBride, engineer, said a person could not rip the wire back without the aid of an implement.

[60] It is significant that neither expert witness said it was impossible for hounds to rip the wire as described. Mr McBride accepted there is no test to establish the amount for force required to rip the wire and much depended on the strength of the wire, the wood to which it was attached and the strength of the attaching staple. In the present case it was accepted that the wire was ordinary chicken wire. Further the wood was at least 15 years old and from the photographic evidence it was clear that it had never been treated.

[61] All the experts agreed that the hounds did gnaw wood and thus could gain entry in this way. I therefore find that the hounds gnawed the wooden slats and gained entry to the racing loft in this way. I also find that the hounds gained entry to the aviaries by ripping and pulling wire back. I accept the expert evidence of Dr Scullion on this point. This is supported by the independent evidence of Mr Harty who said that when he carried out repairs the timbers were so old they needed to be replaced. In addition the photographic evidence shows that the wire was ripped and buckled back. I therefore find the dogs could easily rip the wire from

a rotten timber frame and in this way gain entry to the aviaries. I therefore find that the hounds did gain entry to the lofts and aviaries as described by the plaintiff and his witnesses.

**c. Did the hounds kill and injure the plaintiff's pigeons?**

[62] The defence alleged that hounds have no propensity to attack and kill pigeons. They further allege that the injuries sustained by the pigeons were inconsistent with a dog attack but were consistent with the plaintiff himself wringing the pigeons' necks.

[63] In support of the first contention the defence relied on the expert evidence of Mr Scull and Mr Griffith, a veterinary surgeon. Mr Scull opined that he had never seen or heard a pack of hounds splitting up and attacking birds. He denied that hounds carried out "surplus" kill. On this basis he averred that the hounds could not attack or kill the plaintiff's pigeons. His evidence however was seriously undermined in cross-examination when he had to concede that dogs would be attracted by the flapping of birds and that sheep worrying was an example of "surplus kill". More significantly his evidence was at odds with the expert veterinary evidence of Mr Griffiths who referred to an academic article by Munroe and Munroe which stated:

"Dogs may gain access to poultry houses and game bird pens, inflicting heavy losses."

[64] In view of all this evidence I find that hounds have the propensity to attack pigeons and can inflict heavy losses.

[65] In relation to the question of causation of the injuries I heard expert veterinary evidence from Dr Scullion and Mr Griffiths. Both experts were very well qualified and experienced. Mr Griffiths said that he found no evidence upon his examination of the samples of pigeons he received, indicating that the pigeons had been killed by dogs. In contrast Dr Scullion, both in his report and oral evidence opined that all the lesions, tears, lacerations and puncture wounds he noted were consistent with a dog attack. In particular he stated that the puncture wound was consistent with a dog's canine tooth. The crushing fractures, he noted were consistent with the mechanism of a dog ripping and tearing pigeons apart. In his view "dogs were at the top of the list for high probability of causing the injuries".

[66] It transpired during the hearing that each expert had in fact received different samples of pigeons. Mr Griffiths accepted that if he had made the same findings on examination as Dr Scullion, he would not disagree with his conclusion as to causation. He further stated that he was not in any way challenging the findings and conclusions of Dr Scullion.

[67] I am satisfied that Mr Griffiths was limited in the findings he could make given the samples he received. They were limited, many were of a poor quality and they were different to the samples received by Dr Scullion. I have no doubt that Dr Scullion carried out a full post mortem examination and that he saw injuries which were entirely consistent with a dog attack. He is a very experienced expert and I accept his evidence in this regard. I am therefore satisfied that the injuries were entirely consistent with an attack by hounds.

[68] The only alternative proposition put forward by the defendant was that the plaintiff had killed the pigeons himself. In this regard the defence relied on the evidence of Mr and Mrs Willis who relayed a conversation they had with Mr Colin Weir, the plaintiff's brother. During this conversation Mr Weir informed them that the incident did not happen. He stated that he was "there all day". He stated that the plaintiff had come home from England and pulled about 40 of the pigeons necks.

[69] Mr Colin Weir did not give evidence although he made a statement served under the Civil Evidence (Northern Ireland) Order in which he denied that he had ever had such a conversation. The plaintiff also strenuously denied that he had killed his own pigeons.

[70] On the basis of the evidence presented to the court I am satisfied that Colin Weir was not present at the plaintiff's premises on the day in question. The veterinary evidence establishes that the injuries are entirely consistent with a dog attack. I have been shown a number of photographs which depict pigeons torn into tiny pieces. Such injuries are not consistent with a person simply wringing their necks as alleged.

[71] Additionally I have heard and seen the plaintiff giving evidence in the witness box over a number of days. It is clear from his demeanour that he loves pigeons and was visibly distressed as he recalled the scene of devastation he met on 7 February 2009 when he came out from lunch. I find it incredible that such a person would kill pigeons he had raised for many years for no good reason. This is especially so in light of the evidence he gave that he has never put down any of his pigeons even though they were no longer of any profitable use to him. He indicated that he allowed them to live "out their day". I am therefore satisfied on the evidence of the plaintiff, the expert veterinary evidence and the corroborating evidence given by Mr Calvin and Mr Gerald Weir that the hounds belonging to the Hunt Club did kill and injure and plaintiff's pigeons on 7 February 2009.

[72] Having considered the credibility of the Plaintiff and his evidence, and in particular having regard to the matters raised by the defence and the factors set out by Gillen J in Thornton, I am satisfied, on the balance of probabilities that the incident alleged by the plaintiff did occur.

### Question 3 – What loss did the plaintiff sustain?

[73] The plaintiff's claim is for:

(a)	Loss of pigeons -	£21,170
(b)	Consequential loss -	£37,500
(c)	Repairs to aviaries -	£1,310
	Total	<u>£59,980</u>

In addition the plaintiff claims damages for distress and injury to feelings.

[74] Mr Calvin was called as an expert valuer by the plaintiff. The defendant attacked his independence and competence, expertise and integrity. In an earlier *ex tempore* ruling about the admissibility of his evidence I ruled that it was admissible as he had the necessary expertise and independence to act as an expert witness. I therefore do not intend to rehearse the various matters set out at the time. I did however indicate that notwithstanding my ruling the question of the weight to be given to his evidence would be a matter that should be considered at a later stage.

[75] Mr Calvin prepared three valuation reports and give oral evidence to the court. In his first valuation dated 19 February 2009 he placed a current market value of £62,700 on 49 racing pigeons. In evidence he explained that he had originally prepared a handwritten report which Mr Weir subsequently had typed up and Mr Calvin then signed it. He averred that the reference to 49 was a typing error and his original handwritten report had stated 59 as this was the figure the plaintiff gave to him. Therefore 59 pigeons were valued at £62,700.

[76] In a second valuation dated 15 December 2011 Mr Calvin valued 59 “top stock pigeons” at £300 each. He, for the first time also valued consequential loss at 180 birds per year for three years at £100 each.

[77] In his third valuation report, which was undated, he valued each bird individually. This resulted in a total loss of £21,170. In addition he valued consequential loss at 150 birds per year for five years at £50 each.

[78] In examination in chief he explained that the second valuation was an average valuation. He then indicated that he was requested by the plaintiff to carry out a more detailed valuation in respect of each bird and this led to him preparing his third valuation. Mr Calvin was cross-examined about a number of matters and it was submitted by the defendant that no weight should be attached to his evidence given the inconsistencies in the reports and his method of valuation.

[79] In particular the defence sought to undermine the quality of his evidence on the following grounds:-

- (a) The change in description of the birds from “racers” to “stock” to “top stock” pigeons.
- (b) The change in valuation of the dead birds from approximately £1000 each in the first report to £300 in the second report, to individual valuations in the third report.
- (c) The catalogue of errors in the third report and in particular claiming for the same pigeon twice or three times, and claiming for a bird registered in Mr Calvin’s name.
- (d) The change in the claim for consequential loss from 3 to 5 years. The change in the number of birds per year from 180 birds to 150 birds and the change in the valuation of the birds from £100 each to £50 each.
- (e) The admission that the birds were valued as of the date of valuation and not as of the date of the incident in February 2009.

[80] Mr Calvin had never given expert evidence to court before. I accept that there were a number of deficiencies in his report and a failure by him to set out in his final report why he had changed his valuation.

[81] Dealing with the points raised by the defence. In relation to the description of the pigeons, Mr Calvin explained that these terms were interchangeable for valuation purposes. I accept this is correct and therefore this change of description did not, in my view undermine his valuation. Mr Calvin accepted that the figure for the valuation of the pigeons changed in his reports. He explained that the valuation of £300 per bird was an average figure. His final figure reflected individual valuations. I accept this explanation for the change in the valuation figures for the pigeons.

[82] I do not find that Mr Calvin valued birds twice or that he claimed for a bird not belonging to the plaintiff. Mr Calvin explained that the ring numbers were very similar and although the same ring numbers appeared on his report this was due to typing errors as he was clear he had not valued any bird twice. I accept this explanation. I also accept that he sold a bird to the plaintiff which the plaintiff then failed to register. This accords with earlier evidence given that the plaintiff did not keep proper records.

[83] In respect of the consequential loss Mr Calvin gave unchallenged evidence that it took five years to build up stock to the point of breeding. He also indicated that he had reduced the number of birds born each year from 180 to 150 as he accepted some eggs did not hatch. He further explained the reduction in value from

£100 to £50 was on the basis that he did not want to place a value on birds that did not exist. I accept his evidence that he changed the valuation to £50 as this was the minimum value which would be paid for any pigeon and was a “rock bottom” price.

[84] It is accepted that the correct valuation date is February 2009. Mr Calvin’s valuation however was as at the date of his report. Mr Robinson, who was called by the defence, accepted that valuations would diminish over time. Therefore it is clear that the valuations given by Mr Calvin if anything were less than the true value of the plaintiff’s claim and for this reason I am prepared to accept the valuations set out by Mr Calvin.

[85] Initially I had reservations about the quality of the expert reports provided by Mr Calvin and in particular whether they complied with the requirements of the expert’s declaration. I am satisfied however that in his oral evidence Mr Calvin remedied these defects. I am further satisfied that he had the ability to carry out an expert valuation. He had all the necessary materials before him to carry out a valuation. He had breeding cards, pedigrees and he knew the performance records of the plaintiff’s pigeons. Mr Robinson accepted that if a valuer had all the information Mr Calvin had then he could carry out a valuation.

[86] Under intense cross-examination Mr Calvin was consistent in holding that his valuation “held good”. No other expert valuer was called to counter his valuation. The defendant could have called an auctioneer or other expert. They only called Mr Robinson who admitted that he was not an expert in valuation and it became clear during cross examination that he was not as expert as Mr Calvin about pigeons. One example of this arose in respect of the life expectancy of pigeons. Mr Robinson had to make major concessions about this during cross examination and it was clear Mr Calvin was more expert than Mr Robinson about this matter even though Mr Robinson was an ornithologist. This confirms my view that Mr Calvin was an expert in respect of pigeons and their valuation. Such expertise was gained through long years of experience in breeding pigeons, attending meetings, auctions and races. He attended sales on a weekly basis and he had particular expertise in knowing the value of pigeons through his own interest in pigeons and had frequently given advice to other pigeon fanciers in relation to value.

[87] I therefore find that although there were initially seemingly defects in the reports by Mr Calvin the defects were all remedied fully by him in his examination in chief and in cross-examination. I therefore accept the final valuation given by him in respect of the value of the birds and their consequential loss as being correct.

### **Damage to the aviaries**

[88] The plaintiff gave evidence that he carried out emergency repairs to the loft himself. He then purchased materials including wire and timber from BT Mullan at a cost of £559.88. Thereafter he employed Mr Jonathan Harty to do the repair work. He stated that Mr Harty did the work after a number of weeks “on and off”. He

paid him £800 by way of two instalments namely £400 directly to Mr Harty and £400 to Mr Harty's wife. Initially he received an invoice entitled "Harty Culture" which detailed the work done. It confirmed that the materials had been supplied by the plaintiff and that labour costs were noted at £800.

[89] Subsequently for the purposes of his claim the plaintiff asked Mr Harty's wife to prepare an invoice. He wanted this invoice to include not only labour costs but also costs of material. He received a typed up paper headed "Mr Fix It" which set out an invoice for materials and labour totalling £1,310. The plaintiff accepted that £200 of the cost for materials related to betterment.

[90] When Mr Harty gave evidence he confirmed that the materials had been supplied by the plaintiff. He further confirmed that he had received £400 from the plaintiff and that £400 had been paid to his wife. He stated that he had no knowledge about invoices but accepted that the invoices were probably issued by his office. He further confirmed that it took him a number of days to carry out the repair work as it involved disassembling the aviaries, removing the wire, replacing timbers, rewiring and then reassembling. When cross-examined he said the wire was buckled and therefore it was necessary to carry out substantial works of repair. Under cross-examination he did accept that of the 80 hours he worked only 60 hours related to the repair work. The other hours billed related to other works he had carried out for the plaintiff.

[91] The plaintiff was cross-examined on the basis that the invoices were forgeries. Whilst there were discrepancies in the documents prepared by Mr Harty and his office these discrepancies did not indicate the plaintiff was dishonest but rather indicated that Mr Harty did not pay attention to paperwork. I do not accept that the documents were forgeries. Mr Harty was an independent witness and he had no reason to lie for the plaintiff. He gave his evidence in a very honest and straightforward manner. I therefore accept that the plaintiff paid him £800 for labour costs. I further accept that the plaintiff paid for the materials himself. It is true that the document produced to the court was not an invoice from BJ Mullan but the plaintiff explained that he had lost this invoice and that BJ Mullan had later prepared a customer quotation for him on the basis of what he and the shop assistant recalled he had purchased. I do not accept that the document produced to the court was a forgery. If the defence wished to make this case it would have been a simple matter for them to call a witness from BJ Mullan. No such witness was called. I therefore find that the plaintiff did purchase wire and timber to the cost of £510 and that Mr Harty carried out repair works which cost £800.

[92] Given the plaintiff's concession about betterment however I deduct £200 from the sum for materials. I deduct a further sum of £200 from labour costs as Mr Harty spent 20 hours carrying out unrelated work for the plaintiff which did not relate to the aviaries. I therefore find the total costs of repairs and materials to be £910.

## **Discussion**

[93] On the basis of my findings, on the balance of probabilities, the incident occurred as described by the plaintiff. It follows that the plaintiff is entitled to damages for the dead pigeons, costs of repair to the aviaries and consequential loss.

[94] Given my findings on the valuation evidence the plaintiff is entitled to:

- £ 21,170 for loss of the pigeons and
- £ 37,500 for consequential loss in respect of pigeons and
- £ 910 for repairs to aviaries

[95] The plaintiff also claims damages for distress and upset. He gave evidence about the upset felt by him in losing pigeons he had spent many years breeding. He also described how he had to attend his GP for stress resulting from the incident and as a result he was prescribed diazepam for his sleep loss and flashbacks. On the basis of the cases set out in paragraph [9] I am satisfied the plaintiff is entitled to recover for non-pecuniary loss arising from the wrongful trespass to his goods and lands and I award a figure of £2,500. I do not award aggravated damages as I do not find that the trespass was deliberate, high-handed or oppressive.

## **Conclusion**

[96] I find for the plaintiff and award a total figure of £59,580 and £2,500 for distress and injury to feelings. To these figures will be added the appropriate interest on general and special damages together with costs. If the parties have any difficulties in calculating the arithmetic involved the matter should be relisted before me.