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(subject to editorial corrections)*

2006 No 58854

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

SEAN PAUL WRAY, A MINOR BY HIS MOTHER AND NEXT FRIEND SHARON WRAY

Plaintiff;

and

DERRY CITY AND STRABANE DISTRICT COUNCIL

Defendant.

MAGUIRE J

Introduction

[1] The plaintiff in this case is Sean Paul Wray. He was born on 21 October 1999. On 29 June 2013, when he was aged 13 and 8 months, he was involved in an accident at a sports complex in Strabane, County Tyrone. As a result of this, the plaintiff sustained injuries for which he seeks damages from the Derry City and Strabane District Council ("the Council") which is responsible for the complex and is the defendant in these proceedings. At the date of hearing, the plaintiff was just about to turn 20 years of age. He is, therefore, no longer a minor.

The Accident

[2] It seems clear that the plaintiff has for long been a keen footballer. Even by the age of 13, he had become well-known in footballing circles in the north west of Northern Ireland. It also appears that much of his leisure time was taken up with playing football.

[3] The plaintiff lived in Strabane and, according to him, often went to play football at the Melvin Park pitch in the sports complex above. He was, he said, one of a substantial number of footballers around his age who went there. The attraction was that the facility at Melvin Park included a multi-use games area which had an

up-to-date artificial surface. The plaintiff therefore viewed himself as a regular user of this facility, whether in the afternoons or evenings or at the weekend.

[4] On the day of the plaintiff's accident he had gone to the facility with a group of others. It was a Saturday afternoon. His evidence was that, with others, he arrived at the facility somewhere around 3.30 - 4.30pm. He entered by climbing over a fence though, as the facility would have been open to 5.00pm, it is unclear as to why he did not use the normal main access point which would have been open at that time.

[5] However, that may be, the plaintiff says the accident occurred around 6.30pm as he was coming out of the facility. By this stage the facility was closed. To exit he had to climb up and over a fence which was well over 6ft high. He was one of a group of 10-15 boys who exited in this way.

[6] In order to climb up over the fence he says that he used one foot to climb up onto a latch type device on the inside door of the locked exit. From this point he launched himself forward and upwards using the toe of one of his trainers as a foothold within the wire fence. He then pushed upwards over the fence but on this occasion, at the top of the fence, he slipped and as a result caught his left arm on the protruding wires of the fence, so sustaining a painful injury. A friend helped him after the accident.

[7] It is not in dispute that immediately after the plaintiff's accident a 999 call was made to the ambulance service. The call was logged at 18.37.57 hours. An ambulance arrived nearby within minutes. According to the contemporaneous record, the following history was taken from the plaintiff:

> "Was climbing a 7ft metal fence … at the top his foot slipped and his left arm got caught … was helped of [sic] the fence by a friend. [Patient's] arm was supporting his body weight".

Later he confirmed, again according to the contemporaneous note, that his arm had caught on a metal spike fence. The catching of the arm produced a deep wound.

The Plaintiff's Claim

[8] The plaintiff seeks damages from the Council in these proceedings. At the time of the accident he accepts he was a trespasser at the Melvin Sports Centre ("the Centre") as it had closed at 5.00pm and, even if he had any right to be there in the first place, that right had long since expired.

[9] The plaintiff's claim accordingly is made under the terms of the Occupiers' Liability (Northern Ireland) Order 1987 ("the 1987 Order").

[10] In its material part it reads:

> "Article 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 purpose 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 moveable 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 the circumstances of the case to see that he does not suffer 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 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) …"

[11] The key provision in the above is Article 3(3) which sets the conditions for the establishment of liability in respect of an occupier of premises to a person, like a trespasser, who is not a visitor. In Clerk and Lindsell on Tort (22nd Edition) the matter is put thus in the context of the provisions of the Occupier Liability Act 1984, which is materially similar to the 1987 Order:

> "The main provision of the Occupiers' Liability Act 1984 is s. 1(4), by which an occupier owes the trespasser a duty to take "such care as is reasonable in all the circumstances of the case to see that the trespasser does not suffer injury on the premises" by reason of any danger on them, provided three conditions are met. These are:
>
> (a) that the occupier knows of, or has reasonable grounds to believe, the existence of the danger on his land;

(b) that he knows, or has reasonable grounds to believe, that the trespasser is in the vicinity of the danger, or is likely to come into it; and

(c) that "the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer some protection"." (see paragraph 12-64).

Case Law

[12] A substantial jurisprudence has built up in respect of the above provisions.

[13] Mr Dermot Fee QC, who appeared with Mr McDonnell BL, for the plaintiff relied, in particular, on the case of *Haughian v Northern Ireland Railways Co Ltd* [2001] NIQB 44. Kerr J (as he then was) offered the following analysis of the issues which arise under Article 3(3).

[14] Speaking in the context of an accident not dissimilar to that involved in the present case where a trespasser had injured himself in the course of climbing a fence, the learned Judge said:

> "The first question that arises is whether the fence constituted a danger. Mr Ferrity submitted that it did not, since its very purpose was to prevent persons from entering an area of potential danger and that it remained effective for that object in that it could only be traversed with difficulty and required significant determination on the part of the plaintiff. In my view, this argument is based on a misconception. The fact that the fence is designed to prevent access to the railway line is not relevant to the question of whether it is itself dangerous. The top of the fence has sharpened spikes. They were capable of inflicting injury, as, indeed, the plaintiff's accident illustrates. I consider that the fence was a danger to anyone who tried to climb over it.
>
> The next issue is whether the defendant was aware of or had reasonable grounds for believing in the existence of the danger. The plaintiff claimed that he and his friends had used the prised down section of fence on a number of occasions. The piece of wood that enabled them to climb over the fence was, according to him, a permanent fixture. Mr Metcalfe had seen the section of fence but not the wood. Although it did not occur to him that the fence

> had been turned down in order to allow people to climb over it, I consider that this was the obvious reason that part of the fence had been prised down. When one has in mind that the defendant (through Mr Metcalfe) was aware that a section of the fence had been prised down, that young people were known to trespass on the rail track and beside it, that – as the defendant either knew or ought to have known – the waste ground was adjacent to a residential area and that young people used it as a play area, it is in my view irresistible that the defendant had reasonable grounds for believing that people – and in particular young people – were climbing over the fence. In consequence, the defendant ought to have known that young people were at risk of injury because they were using this part of the fence to gain access to the area beside the railway track.
>
> I believe, therefore, that the defendant should have considered what steps were necessary to deal with the fact that this was happening. It was a risk `against which, in all the circumstances of the case [the defendant could] reasonably be expected to offer … some protection'. Moreover, elimination of the risk (or, at least its reduction) should not have been difficult. If the prised down area had been returned to its original position it would (at a minimum) have discouraged young people from using the fence. Alternatively, the sharpened spikes could have been bent over or blunted so that at least the risk of serious injury would not have been as great. I have concluded, therefore, that the defendant is liable to the plaintiff".

[15] Similar approaches to the tests contained in Article 3(3) are found in the cases of *Burke v South East Education and Library and NK Fencing* [2004] NIJB 13 (per Higgins J as he then was) and *McKinney v Secret Heart Primary School* [2008] NIQB 101 (per McCloskey J as he then was).

[16] Mr Millar BL, for the defendant, relied, in particular on *Phillips v South East Education and Library Board* [2015] NIQB 91, a judgment of Deeny J, as he then was. He also referred the court to a decision of the England and Wales Court of Appeal in *Keown v Coventry Healthcare NHS Trust* [2006] 1 WLR 953.

[17] In *Phillips* the plaintiff was a boy of 11 at the time of the accident. He had been playing with other boys on ground adjacent to a Nursery School. It was late afternoon and the school had closed. One boy kicked a ball over the fence

surrounding the school and the plaintiff tried to climb over the fence but in the course of doing so he slipped and sustained a significant injury to his left hand.

[18] There was no issue that the plaintiff at the material time was a trespasser so that the terms of the 1987 Order applied to him.

[19] The case was, therefore, not unlike the present case. The fence which the school had put in place arose from a pre-existing problem the school had faced involving young people and vandalism. Moreover it was a fence not dissimilar to the fence involved in this case. Both were manufactured by NK Fencing. It was of a similar height and met, as the fence in this case also met, the relevant British Standard. In addition, it had vertical protrusions at its top but these were not sharp and were not viewed by the Judge as 'spiked'. Again, in this respect also this resembled the present case. The wire protrusions were buffed before being painted.

[20] The Judge held *inter alia* that it had not been shown that the fence itself was a danger with the consequence that Article 3 (3) (a) of the 1987 Order was not satisfied. He put the matter in the following way at paragraph [16]:

> "Was there something wrong with the 'state of the premises'? The fence was in good repair. It was a product which complied with the relevant standard …here there was a risk of the plaintiff suffering injury by attempting to climb over a seven feet high wire mesh fence but the presence of that fence did not amount to a "danger due to the state of the premises or to things done or omitted to be done to them". Those words and the Order in general, imply a measure of fault on the part of the occupier which I find entirely absent on these facts".

Later, at paragraph [17] he went on:

> "For completeness, if a duty of care was considered to be owed by the defendant as a result of its choice of this particular wire mesh fence it is difficult to see how it could comply with article 3 (4) of the 1987 Order. It had chosen a fence which is perfectly legal and conforms to the relevant British standard. Having done so, how could it "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? No step was suggested in that regard, save a very faint suggestion about a kind of warning sign which might comply with art 3 (5). However there was no evidence that that was a necessary or a reasonable step i.e to put up a sign saying

> not to climb on a fence. I find that to be not so much a counsel of perfection as verging on the absurd".

[21] In *Keown,* another 11 year old was involved. He climbed the underside of an external metal fire escape at an accommodation block and fell some thirty feet sustaining significant injuries. The plaintiff had partly succeeded in the lower court but in the Court of Appeal all of the judges found against him. The principal ground for their finding was that the plaintiff, as a trespasser, had not satisfied the condition found in section 1 (1) (a) of the Occupiers Liability Act 1984 which is the equivalent of Article 3 (3) (a) of the 1987 Order.

[22] In essence, the Court of Appeal accepted that on the facts of the case any danger was due to the claimant's activity on the premises and was not due to the state of the premises. The court relied on such authorities as *Donoghue v Folkestone Properties* [2003] QB 1005 and *Tomlinson v Congleton Borough Council* [2003] 2 WLR 112 (Court of Appeal) and [2004] 1 AC 46 (House of Lords).

[23] In *Tomlinson* in the Court of Appeal Lord Phillips at paragraph [53] noted that he could not identify the "state of the premises" which posed a danger which carried with it the risk of injury suffered by [the plaintiff]. He added:

> "It seems to me that Mr Tomlinson suffered his injury because he chose to indulge in an activity which had inherent dangers, not because the premises were in a dangerous state".

[24] In the House of Lords, Lord Hoffman said at paragraph [27]:

> "It is relevant at a number of points in the analysis of the duties under the 1957 and 1984 Acts. Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk. The risk was that he might not execute his dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity. In the present case, Mr Tomlinson knew the lake well and even if he had not, the judge's finding was that it contained no dangers which one would not have expected. So the only risk arose out of what he chose to do and not out of the state of the premises".

[25] Applying the above in *Keown* to the case before him, Longmore LJ said that in the present case "there was no suggestion that the fire escape was fragile or had anything wrong with it as a fire escape and I do not think it can be said that the claimant suffered his injury by reason of any danger due to the state of the premises".

[26] Lewison J reached the same conclusion. At paragraph [26] he said:

> "As Lord Hoffman pointed out in Tomlinson v Congleton Borough Council…a duty can only arise in relation to a risk that falls within section 1 (1) (a). It is only if the risk is one that falls within section 1 (1) (a) (thus giving rise to the possibility that a duty arises) that one goes on to consider whether any duty in fact arises (section 1 (3)) and, if it does, the content of that duty (section 1 (4)). In the present case it is not contended that any risk arose because of things done or omitted to be done on the premises. The threshold question, therefore, is whether there was a risk of suffering injury by reason of any danger due to the state of the premises".

[27] The court's approach therefore will be to apply the tests outlined above to the facts of the present case.

The Fence

[28] The Melvin Sports Centre is an important sports facility in the town of Strabane and is found within a built-up area within the town. It consists of a pavilion like structure containing offices and changing rooms and other facilities and an outdoor area which *inter alia* contains an astro pitch and a multi-use games area. The astro pitch ordinarily is rented out to those who wish to use it for a period whereas the multi-use games area is generally kept available for casual visitors to use, including visitors who live in the local area. Around the totality of the complex is a fence which is 2.4 metres high. It appears that this was relatively recently put in place, *circa* 2004. The fence is a wire fence and is characterised at its height by the presence of vertical wire protrusions which stand proud of the underlying horizontal wiring. These protrusions protrude 21mm measured from the horizontal top rail.

[29] It was explained to the court by Mr O'Kane, who had been a manager at the Centre since around January 2004, that the fence was put in place because in the past the complex had suffered from vandalism, disfiguration by graffiti, drinking within the grounds by underage youths and occasional fire raising. A project was therefore undertaken by the Council which involved the putting in place of a perimeter fence as a control measure. The idea was that the fence would seek to counteract anti-social behaviour by deterring persons from seeking access to the arena out of

hours and by making it difficult for persons to gain access to or egress from the Centre at other than a limited number of access points which were open only when the Centre itself was open.

[30] While the project also included general refurbishment, Mr O'Kane indicated that, as far as the fence was concerned, it had been designed by reputable consultants, and put in place by main contractors and a specialist fencing contractor.

[31] In his evidence to the court, once completed, the project was a considerable success, as he said that over time vandalism had disappeared; the use of graffiti died out and there was a significant change for the better. In his opinion, there was not, after the implementation of the project, any significant problem with persons, including in particular youths and boys, entering the complex out of hours or staying on in the premises out of hours.

[32] In addition to the evidence of Mr O'Kane, two consulting engineers gave evidence about the fence. On behalf of the plaintiff, Mr Declan P Cosgrove gave evidence whereas, on behalf of the defendant, Mr Trevor Wright gave evidence.

[33] The latter identified no particular difficulties with the fence which had been installed. He felt that the design and construction of the fence was unexceptional. In particular, he considered that there was nothing wrong with the use of vertical wire protrusions or with the use of a drop bar and latch configuration for the gates within the fencing. These could be accessed principally from within the fenced area and, in Mr Wright's view, this arrangement was understandable and appropriate, notwithstanding that Mr Cosgrove was critical of it.

[34] It was not in dispute between the experts that the fence (and gates within it) met relevant British standards and in particular BS1722 1999 which was the relevant standard at the date of its installation.

[35] Mr Cosgrove's view, in contrast, was that the upward protrusions were in the nature of a hazard to anyone seeking to climb the fence and that there was no need for a danger of this type to be incorporated in the fencing which could, he felt, have equally well served its purpose without them. Interestingly, Mr Cosgrove in his report acknowledged that the presence of the upward protrusions could be viewed as desirable in an anti-intruder fence. Nonetheless, Mr Cosgrove's overall view appeared to be that the Council "had deliberately introduced a hazard at this fencing which may not have necessary". He did not think it was necessary given the nature and environment of the installation.

[36] Mr Cosgrove also felt that the situation he had described was compounded by what he described as the "inadvertent provision of footholds" at the pedestrian gate which it appears the plaintiff had been using just before the time of the accident. The plaintiff had, it will be recalled, been climbing the gate from within the fence as his intention was to leave the Centre by climbing the fence as the Centre was closed.

The presence of a drop bar and latch enabled the climber, according to Mr Cosgrove, to obtain a foothold which was important because the spaces within the fence itself were designed to prevent any such foothold being gained without considerable difficulty.

[37] As far as the plaintiff was concerned, as already noted, he claimed to have entered the Centre by climbing over the fence on the day of the accident. He sought to exit by doing the same thing. The particular gate where the accident occurred (at the hearing referred to as the "subject gate"), the plaintiff maintained, was always locked. Indeed, he said he had been a regular user of the Centre but had never seen it open. Not only was it common for him to climb over the subject gate but many others, he said, both on the day of the accident and on other occasions did so.

[38] In particular, the plaintiff alleged that it was well-known to staff at the Centre that climbing the fence was a common place activity for persons like him and his friends. It was also, he said, common for staff to be aware of people like him being inside the complex playing football at closing time. The staff were unconcerned about this, in the plaintiff's opinion. The matter, he considered, was left on the basis that those playing football would simply play on until they were ready to go and then leave by climbing over the fence, as indeed the plaintiff was doing (together with a group of others) at the time of the accident.

[39] As is obvious from what has already been said, Mr O'Kane strongly refuted that such practices went on or were known to staff. On this issue, therefore, the court notes that diametrically opposed views were expressed as between the plaintiff and Mr O'Kane.

The court's assessment

Did the occupier know of, or have reasonable grounds to believe, the existence of the danger on his land?

[40] The plaintiff's case in relation to this aspect of the matter is not that there is a danger within the sports complex itself but that the fence, which is designed to keep trespasser's out of it, itself is a danger.

[41] In the court's view, the fence has not been shown to be dangerous.

[42] In reaching this view, the court reminds itself that, in accordance with Mr O'Kane's evidence, there was a perfectly proper reason for erecting the fence in 2004. This was to prevent anti-social behaviour which, at that time, was prevalent and took the form of persons, often young persons, gaining access to the facility out of hours. The fence was intended as a control measure and it seems to the court that, in principle, there was good reason for the Council taking the steps it took.

[43] The plaintiff's attack centred on the design of the fence erected but the court is unpersuaded that the aspects of the attack mounted have any or any substantial merit.

[44] First of all, it seems clear that the Council went about the project it had decided to undertake in a professional way taking advice from consultants of good repute and contractors skilled in the erection of fencing, in particular, this sort of fencing.

[45] Secondly, the fencing actually used is commonly found as a control measure at a wide variety of facilities throughout Northern Ireland. Moreover, the fence is consistent with the guidance found in the relevant British Standard.

[46] Thirdly, the purpose of the fence was and is to keep intruders out. Anyone seeking to climb the fence will appreciate that it is not intended to represent other than a barrier to entry to the facility in question. A moment's study of the fence will disclose (even to a person of 13 years, the plaintiff's age at the time of the accident) that it was not intended that the fence be scaled and that the presence of the vertical protruding wires at the top of the fence was to make the scaling of the fence more difficult and less attractive to those who might be tempted to seek to do this. In his evidence to the court the plaintiff readily accepted what the purpose of the fence was and acknowledged that in the course of scaling a fence like this, there is always the risk that the climber can get hurt if he loses his footing or balance. Most obviously, he may end up falling off the fence altogether.

[47] Fourthly, it is relevant to observe that there was no dispute before the court but that the protruding wires were not in themselves sharp or sharpened but are flat and blunt. In this case, it is noteworthy that the court is not at all dealing with the type of fence top considered by Kerr J in *Haughian*. In the present case, placing a hand or hands on the protruding wire at the top of the fence, in itself, would not be injurious. On the other hand, anyone climbing a fence may slip and as a result become entwined with the fence or fall and sustain an injury. These are ordinary risk factors known to these who choose to engage in this type of activity. Those factors were known to the plaintiff.

[48] Fifthly, the presence of the drop bar and latch configuration on the inside of the subject gate is, in the court's estimation, unexceptionable. No evidence was before the court that the gate should not have a latch and/or a drop bar, both of which features serve obvious purposes. The latch was part of apparatus to enable to gate to close and be secured and the drop bar created the ability to anchor the gate in a fixed position, whether open or closed. The court has no reason to believe that the use of these elements within the apparatus of the gate was other than what would be expected or normal, especially as they were designed to operation from within and not without the facility. In reality, it was the plaintiff's presence inside the facility seeking to climb the fence to exit which created a problem which would not otherwise exist. The court rejects the view that the drop bar and latch can

reasonably be viewed as a design flaw simply because it is possible they might be used by someone in the plaintiff's position.

[49] Overall, on this issue the court answers the question above in the negative. It follows the approach put forward in the cases of *Phillips* and *Keown* as discussed above. The court holds that the fence itself was in good repair, met contemporary standards and did not itself represent a danger. The reality of this case is that it was the plaintiff's own actions in seeking to climb the fence which was the operative factor in creating the danger which materialised. There was nothing significantly wrong with the fence and the plaintiff was himself aware of the protrusions which themselves did not create a danger in the form of the fence. The court additionally rejects the invocation by the plaintiff of the notion of "allurement" which Lewison J described in *Keown* as "a throw-back to the old idea that an occupier who permitted an allurement to exist on his premises gave an implied licence to children to enter them, thus making them 'invitees'" (see paragraph [32] *supra*). In the court's judgment, the use of this description does not advance matters given the terms of the 1987 Order which explicitly replace the rules of common law which hitherto had applied.

[50] The court is of the opinion that the case of *Haughian* is distinguishable from the present case. In that case there were sharpened spikes which is not the case in relation to the case before the court. The combination of this feature and the prised down section of fence in *Haughian* places the fence in that case into a different category than the fence which is under consideration by the court.

[51] This finding by the court is determinative of the case but, in case the court should be wrong about its conclusion, it will consider the other questions which arise.

Did the Council know or have reasonable grounds to believe that the plaintiff was in the vicinity?

[52] It was in relation to this issue that the court was confronted by a substantial gulf between the evidence of the plaintiff and the evidence of Mr O'Kane in relation to the issue of whether the defendant was aware of youths like the plaintiff entering and leaving the Centre by climbing the fence; youths staying on after closing time to the knowledge of the defendant; and of gates, such as the subject gate, being kept locked.

[53] The court has largely been left to assess bare assertions on these aspects. The plaintiff has maintained that the defendant was aware of all these matters whereas Mr O'Kane staunchly denied that the defendant did.

[54] On the side of the plaintiff, there was little in the nature of confirmatory evidence in respect of his claims. He did not, for example, call any of the other persons he said frequented the facility in this way, which, if his account was correct,

would not have been difficult to arrange. While his step father gave evidence he was unable personally to shed light on this issue. The best he could do was to make reference to what he claimed a woman called Debbie McConnell said to him sometime after the accident about children climbing the fence all the time and about her complaining to the authorities about this. However, in discovery there was nothing which supported the existence of such complaints. The court is unable to put any faith in this evidence and declines to allocate it any weight.

[55] On the other hand, Mr O'Kane's evidence was based largely on his own say-so, and the defendant called no other evidence on this aspect of the case. Other members of the staff of the Centre could have been called but were not and such paperwork as was produced offered little or no guidance.

[56] In the end, the court has limited evidential material at its disposal. Doing the best with what he has, the court recalls that there was no serious challenge to the plaintiff's evidence as to how the accident occurred. The plaintiff, on the balance of probabilities, was seeking to climb over the fence at the time of the accident and the time of the accident was out of hours on a Saturday. It seems unlikely to the court that this was an isolated event. The plaintiff did have at least one friend available to help at the time, and his presence is verified by the ambulance records.

[57] In these circumstances the court is prepared to accept that boys or young persons like the plaintiff did from time to time climb the fence going in and out of the facility. The court will also, on balance, accept that it is likely that there were occasions when staff will have left the Centre at the close of business in circumstances were young people remained using the facilities. The court is inclined to think that is what happened here, as the plaintiff maintained. This suggests that staff left the premises without ensuring that persons in the facility had left.

[58] The court is unable to reach any clear view as to whether gates, such as the subject gate, were kept permanently closed. It harbours doubt as to whether this was right.

[59] The court will hold that the question now under consideration may be answered in the following way: that the Council did have or ought to have had knowledge on the day of the accident of the presence of the plaintiff and some others in the vicinity and ought to have had knowledge that on occasions the subject gate was scaled by local young people to gain access to or from the facility.

Was the risk one against which, in all the circumstances of the case, the plaintiff may reasonably have expected to be protected?

[60] Consistency with the court's answer to the first question, it is the court's clear view that the above question should be answered in the negative.

[61] The court is satisfied that the risk which arose in this case derived from the activity of the plaintiff and not by reason of anything which the defendant had done or omitted to do. The purpose of the fence, self-evidently, was to keep persons out of the Centre during hours when the Centre was closed and its configuration was such as to deter those who might be interested in climbing over it. The court is of the view that the plaintiff was aware of these matters. Like Deeny J, as he then was, in *Phillips*, this court will take account of the fact that the fence was perfectly legal and conformed with British Standards. A sign which warned against persons climbing it was unnecessary. The risk, in short, was not one which required other measures for the protection of the plaintiff.

Outcome

[62] The court dismisses the proceedings on the basis explained above.

Quantum

[63] The principal injury suffered by the plaintiff in the accident consisted of damage to his left upper arm in the form of lacerations. The court is in no doubt that the plaintiff will have been in considerable pain as he was lifted off the fence and transported, as he was, to Altnagelvin Hospital, where he was admitted. There he had surgery under general anaesthetic and the wound was treated with sutures.

[64] For medical legal purposes, the plaintiff was examined by Mr Derek Gordon, a Consultant Plastic Surgeon, approximately 17 months after the accident. He noted that the wound measured 8x5 cms, through what he described as the fatty tissue. No neurovascular defect was detected.

[65] The main consequence of the accident was that the plaintiff was left with a scar to his left arm but Mr Gordon noted that, notwithstanding the complaints made to him by the plaintiff of some stiffness and pins and needles and some discomfort when the plaintiff engaged in football training, he was able to conduct the normal tasks of daily living.

[66] On his examination Mr Gordon describes a 30x120mm scar on the back of the left upper arm. He could find no wasting of the muscles of the left arm and concluded that the plaintiff had normal distal function, though he referred to a small patch of altered sensation in the area immediately around the scar.

[67] In Mr Gordon's opinion, the scar would be permanent but would not, in his expectation, represent more than a moderate cosmetic deformity. Surgical revision would not, he felt, improve its appearance.

[68] At the hearing the court inspected the plaintiff's scar which appeared to be just below the level of the arm of his tea shirt. In the court's opinion, it was unsightly but fortunately not in a prominent position.

[69] The court accepts that the injury will have disrupted the plaintiff's sporting activities for a period of months.

[70] As far as general damages are concerned the court values the plaintiff's personal injuries and loss of amenity at £35,000.

[71] The court does not consider that any other head of damages advanced by the plaintiff in this case has been made out.