Neutral Citation No: [2019] NIQB 81 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **MAG10937** *Delivered:* **24/05/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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2016 No. 107294

BETWEEN:

NEASON GERALD DYNES

Plaintiff;

-and-

TRANSPORT NI DEPARTMENT FOR INFRASTRUCTURE

Defendant.

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MAGUIRE J

Introduction

[1] The plaintiff in this case is Neason Gerald Dynes. He was born on 21 September 2000. On 25 August 2013 the plaintiff was injured in an accident, at or around 21.30 hours, near his home at 51 Fairgreen Park, Keady, County Armagh. At the time, he was aged 12 years of age. In these proceedings the plaintiff was represented by Mr Keenan QC and Mr Lannon BL whereas the defendant was represented by Mr Reid BL. The court is grateful to counsel for their economy in dealing with the case and the considerable assistance they have afforded to it.

The accident

[2] What the plaintiff says occurred was this. He was playing with other young people on the street near his address. The game they were collectively playing was called "tip the can". There were in the region of 6 to 7 young people playing the game. One of the group was the searcher. At the beginning of the game he/she, at a position near to a lamp standard, closed his/her eyes and counted to a number. This was a signal for the others to go and hide. When the searcher opened his/her eyes he/she would then go searching to find the others. The object of the others, at that point, was to try and make his/her way back to the original point from where the

searcher had set out without being detected or apprehended by him/her. Once there – at or about a particular lamp standard – that person then "tipped the can" by touching the lamp post, so defeating the efforts of the searcher.

[3] On the summer evening in question in this case the young people, before the accident had occurred, had played two previous "tip the can" games. The weather was dry and it was not windy. The third game commenced. The plaintiff was one of those being sought. He went to hide. Once the searcher left his/her position he was able to make his way to the lamp standard without being apprehended by the searcher. Indeed, he was the first, in this game, to tip the can. In fact, what he says he did when he arrived at the lamp post was to climb up on to a nearby electric box and stand on it. Having done so, the lamp post was within touching distance and he duly then – using his right hand – touched the lamp post saying "tip the can".

[4] It was what happened next which constituted the accident as alleged. A number of the other young people made their way back to the lamp post just after him. They did not climb on to the electric box but they did touch the lamp standard and therefore "tipped the can".

[5] However, quite out of the blue, there was alleged to be a failure of the lamp standard. The standard had two elements to it. The first was the part of it which went straight up from ground level, where it was embedded, vertically in the air. The second element was the standard's arm which connected on to the first element. It curved horizontally towards the roadway. At the head of it was the actual light fixture. It was a steel fixture. The light within it was in a plastic casing. According to the plaintiff, the arm of the lamp standard suddenly collapsed and fell down. This made a cracking noise. It did not fall on to the ground but it became substantially detached from the vertical pole into which it fitted. What prevented it from becoming detached was the electrical cable which ran through an inner core within the pole and arm. As shown in photographs – believed to be taken on the following day – the arm hung almost loose of the pole itself, having substantially fallen.

[6] The plaintiff said in evidence that as the arm fell something in or about the lamp area struck his hand which was on the pole. In the course of doing so, it sheared off the tip of his middle finger of his right hand.

[7] The plaintiff said that when this occurred he felt pain and blood poured from his finger. He quickly got off the electric box, where he had been standing, and ran to his house nearby, squealing as he did so. Once home, he was tended to by his mother and step-father. An ambulance was called to the house and when it arrived he was initially taken to Craigavon Area Hospital and later from there to the Ulster Hospital. As a result of the incident, he sustained the loss of the tip of the middle finger of his right hand.

[8] His injuries generally will be discussed later.

The cross-examination of the plaintiff

[9] The plaintiff was vigorously cross-examined by Mr Reid BL, who represented the defendant in these proceedings. The court will, of course, take into account the totality of the cross-examination but it does not intend to do more than place emphasis on a limited number of specific issues which arose. These can be encapsulated in bullet point form:

- The plaintiff denied that the "tip the can" game was a younger child's or primary school game. Rather he thought all children could play it.
- Suggestions that he had been climbing the pole or swinging on its arm were denied.
- He accepted that when he touched the pole it shook.
- He accepted that the other young children were vying with each other to get to the pole first, especially as they were being chased by the searcher.
- However, he was clear in saying that no great force, as far as he could tell, was exerted on the pole by anyone.
- The glass on the lamp itself did not fracture or break.
- His mother had phoned for the ambulance but he was not present when this occurred.
- He denied the suggestion that he told his mother he had been climbing the pole or swinging on it.
- Nor did he say this to the ambulance crew when they arrived.
- The plaintiff accepted that he should not climb or swing on the lamp standard.
- He accepted that in October 2012 there appeared on his Facebook page photographs of him hanging off the pole of a road sign. He denied he was swinging on it. His position showed him holding on to the pole with his body in a lateral position. He said he was younger at that point.
- He personally denied that he used any force on the pole or its arm.
- Another post on his Facebook was put to him. It was posted on 10 January 2018 and was of an image from the United States of America. It showed a man swinging on the arm of a lamp post. He accepted that he had put this post up but he said it was a joke at his own expense to get a laugh because of what had happened in his accident in 2013, but he claimed that this was not what he was doing at the time of the accident.
- The plaintiff accepted the suggestion that the slicing of the tip of the middle finger pointed to the existence of an edge which effectively chopped off his fingertip. He thought this came from the fallen arm.

Supporting witnesses

[10] The plaintiff's side called a number of witnesses in the form of other young people who were there on the night in question and who had been taking part in the game. These witnesses generally supported the plaintiff's account.

[11] The first of these was Mathew Dougan. He is now 21 years of age but was around 15 years at the time of the accident. He confirmed the plaintiff's account in similar terms to the plaintiff. In addition he told the court that after the plaintiff had gone home, he recalled the plaintiff's step-father running towards the group saying that the plaintiff had lost the tip of his finger. He said that the step-father found the tip of the finger at the plastic casing of the fallen arm of the light standard. He said the step-father retrieved it and took it home with him to give to the ambulance crew. In cross-examination, he accepted that he was a friend of the plaintiff's. When asked if he had seen the Facebook postings of the plaintiff, those from 2012, he said that a lot of people did that sort of thing at that time but he had not seen the plaintiff do it. He thought the plaintiff was showing off in posting as he had. He denied that the plaintiff had been scaling the lamp post or had been swinging on it at the time of the accident. Like the other young people involved, he had simply touched the pole without any great force. He said he could recall the arm of the lamp standard hitting the pole itself. He said he was present when the step-father found the tip of the finger.

[12] The second witness was Ostea Rackuskaite. She is 15 years old now and was just 10 at the time of the accident. She lived at Fairgreen Park. Her account broadly was in line with the plaintiff's. She also had been playing the game. She saw the arm of the light standard fall and heard the two elements within the standard bang together as the arm came down. She was not present when the missing part of the finger was searched for, as she had gone home. She knew the plaintiff and lived nearby. When she viewed the photographs from his Facebook page she said she had not seen the plaintiff do these things in the past. Like Mr Dougan she did not see the plaintiff climbing the pole or swinging on it. Her touch of the pole as part of the game did not involve any substantial force. She denied that she was simply helping out a friend.

[13] The third witness was Rebecca Guy who is now 14 years old and was 9 at the time of the accident. The plaintiff, she acknowledged, was her cousin. She had been playing the game that night and gave similar evidence to the other witnesses. She said she saw the accident occur and heard the plaintiff scream and saw him jump down off the electric box and run off home. She ran after him and could see the blood on the floor of his house. She was not involved in the search for the missing fingertip. As with others, she did not consider that her tip of the pole involved much force and did not see the plaintiff climbing or swinging on the lamp standard.

[14] Finally, John Guy, the plaintiff's step-father, gave evidence. He was present when the plaintiff came home in a distressed state. He could see that the tip of the

middle finger was missing and he immediately went out to where the young people had been playing to look for it. They searched initially on their hands and knees but eventually he found it at the lamp of the standard which had come down. It was, he said, wedged between the steel and the plastic at the lamp case. He used his car key to remove it. He thought it might be capable of being re-united with his finger and sent it to the hospital by ambulance with the plaintiff.

Engineering evidence

[15] Two consulting engineers gave evidence in this case: one for each side. Mr McGarry was the plaintiff's expert whereas Mr McLaughlin was the defendant's expert.

[16] In fact, there was little disagreement between them and the court will only specifically refer to the key parts of their evidence, though it has considered the totality of it.

[17] The inspections carried out in this case both took place in 2018, quite a substantial time after the accident. The following emerged:

(a) Both engineers agreed that the lamp standard was in a poor state of repair as it had been subject to substantial corrosion both externally and internally. Its condition when inspected was said to be "precarious".

(b) The height of the lamp standard to the light was 5 metres. The pole element was some 4 metres in height with the height of the arm vertically, additionally, being one metre.

(c) After the accident, the arm was hanging down with the distance between the hanging lamp to the ground being 2.15 metres.

(d) The electrical box which the plaintiff said he stood on when he tipped the can was 0.7 metres high.

(e) The light standard had been removed altogether from the street by the time of the inspections. However, presumably because the accident had been notified to the defendant, the arm of the lamp standard had been retained for inspection.

(f) A single touch, both experts agreed would not cause the arm to fall, even in its "precarious" state.

(g) There had to be something greater in the form of external force being applied to the lamp standard for the arm to come down as it did.

(h) Wind, both agreed, was not a factor in the accident itself as the witnesses had all agreed that it was not windy on the day of the accident.

(i) Corrosion probably was a factor of wear and tear over time.

(j) Something more than vibration would be necessary to bring the arm down.

(k) The part of the lamp standard closest to the ground would likely be the least part affected in terms of succumbing to any force on the pole.

(l) The case may have involved the gradual weakening of the structure due to corrosion but probably some external factor would be needed as the *coup de grâce*.

(m) The inner metal tube which houses the electrical cable was also seriously corroded and had probably fractured.

(n) Mr McLaughlin confessed he had difficulty understanding how there had been a slicing action applied to the middle finger of the plaintiff.

Other evidence

[18] In the trial bundle there were a number of interesting pieces of evidence to which attention was drawn by one or other of the parties. These included:

(i) Copies of pages from the plaintiff's Facebook relating to the plaintiff's apparent interests sufficiently described above.

(ii) Some descriptions of the accident found amidst the medical evidence. There is a record from Craigavon Area Hospital's Emergency Department. The plaintiff arrived there at or about 22.45 hrs on the date of the accident. The record states he "was playing tip the can tonight and his distal middle finger was accidentally cut off".

(iii) In contrast with this, the Ambulance records contain two salient entries: one refers to "Er – boy swinging on lamp post when part of it fell and cut off his middle finger in right hand" whereas the other states "12 year old boy got tip of the middle finger cut off by a falling lamp post...".

(iv) There has been an issue generated by the apparent existence of a tape of the plaintiff's mother's 999 call after the plaintiff had returned home after the accident. What exactly is said is difficult to interpret and the court will make no finding about it. Mr Reid, for the defendant, claims

that the mother said that the plaintiff had been outside "climbing…a lamp post". On the other hand, Mr Keenan said the mother referred to the plaintiff "playing" at the lamp post outside. Mr Reid, in his closing pointed out that notwithstanding that this issue had been raised openly with the plaintiff's side before the hearing, the mother was not called to give evidence about it.

Quantum

[19] Taking account of the loss of the tip of the plaintiff's finger on his non-dominant right hand, a minor injury to the index finger of the same hand, the treatment he had at the time of the accident and the operation which the plaintiff had to have in November 2014, the element of disfigurement which arises in respect of the finger, his psychiatric reaction and the effect on his ability to engage in some sports, particularly Gaelic football, the court, having heard counsel on this aspect, in the event of liability being established, would value the plaintiff's claim at £40,000.

The court's assessment

[20] The court has found the issue of liability in this case a difficult one.

[21] While it is willing to accept that the plaintiff sustained his injury broadly in the way which the plaintiff described, it has a concern about the fact that neither the plaintiff nor any of his witnesses was able to describe what it was that caused the arm of the lamp standard to come down in the manner claimed by the plaintiff. The court is conscious that both of the engineers were of the opinion that the mere playing of the game, in the absence of any use of force to the lamp standard by any of the young people, would have been unlikely to cause the accident. Something more must, it seems to the court, have happened than has been disclosed to the court in the evidence. Neither vibration nor wind would have brought the arm of the standard down. The court, moreover, finds itself unable to accept that the coming down of the arm was no more than an event coincidental with the playing of the game.

[22] In these circumstances the court has had to search for a credible explanation for the accident. Plainly, one factor in the accident was the precarious state of repair of the lamp standard but that fact, in isolation, in the court's judgment, could not ground a finding of legal liability on the part of the defendant. On balance, the court believes that the most likely explanation for this accident is that it was probably some act of the plaintiff *vis a vis* the lamp standard which triggered the accident. This may have been him swinging on or climbing it. In this regard the court notes that some support for this explanation arises from the plaintiff's apparent interest, judged by his Facebook postings, in playing himself or observing others playing in a manner which involves swinging or climbing on street furniture. Likewise, the court is inclined to the view that the reference in the ambulance notes to him swinging on the lamp standard would also add support to this possible explanation.

[23] While it could be that one or more of the other young people could themselves have been engaged in some degree of 'horse-play' involving the standard, so causing the arm of the standard to fall, the court believes this to be much less likely.

[24] The court will therefore infer that on the balance of probability there were two causes of the plaintiff's accident. The first was the precarious state of repair of the lamp standard, found by both engineers, which reflects a lack of any reasonable system of maintenance[1] whereas the second was the likely action of the plaintiff in either climbing or swinging on a part of the lamp standard, which caused the arm of the standard to come down, as already described, in a way which resulted in the plaintiff's injury[2].

[25] On the basis of the above finding the court holds that there is a measure of liability which falls on the defendant but that this is a case where part of the cause of the accident can be ascribed to negligent behaviour on the part of the plaintiff in climbing or swinging on the lamp standard in such a way as to bring about the accident and put himself in danger.

[26] In accordance with the terms of section 2 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948, in the court's view, it would be just and equitable to take account of the plaintiff's share in the responsibility for the damage.

[27] The court will hold the plaintiff 50% responsible for the accident as he was probably abusing the road furniture at the time of the accident and was at an age when he should have known better.

Conclusion

[28] The court will therefore award him a sum of £20,000.

[1] A point conceded by Mr Reid for the defendant.

[2] The court is grateful to Mr Keenan for drawing its attention to the decision of Gillen J in *Savage v McCourt* [2014] NIQB 38 which contains a useful discussion at paras [17]-[26] of how a court may consider a theory of how an accident has happened. The court has taken this authority into account.