Neutral Citation No: [2025] NIKB 64 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **OHA12900** *ICOS No:* **22/74765** *Delivered:* **26/11/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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Between:

KENNETH FERGUSON

Plaintiff

and

WOODVALE AND SHANKILL COMMUNITY HOUSING ASSOCIATION

Defendant

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Mr J O'Hare KC with Ms M Herron (instructed by Pascal O'Hare Solicitors) for the Plaintiff
Mr C Ringland (instructed by Clyde & Co Solicitors) for the Defendant

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O'HARA J

Introduction

[1] On 2 January 2020, the plaintiff was injured during the course of his employment with the defendant. There is no dispute of any significance about the manner in which the accident happened. The central issue is whether the defendant was in any way to blame. If I hold the defendant responsible to any degree, then there will be further issues about contributory fault and about the amount of damages to which the plaintiff is properly entitled, but they are very much secondary to the question of liability.

[2] In January 2020, the plaintiff was 42 years old. He was an experienced plumber specialising in servicing and repairing domestic boilers. The defendant housing association had approximately 380 such boilers in the houses occupied by its tenants. From 2014, the plaintiff was employed to look after them. At some point, the defendant also secured six commercial boilers and installed two at each of three sets of sheltered dwellings which they operated. Until late 2019, a specialist commercial contractor carried out all necessary work on those boilers. However, at some point, for whatever reason, that contract ended and the plaintiff was required

to maintain and repair the commercial boilers (as well of course as the domestic boilers) until early 2020 when a new commercial sub-contractor was appointed.

[3] On 2 January 2020, the plaintiff received an alert on his phone that there was a fault in a commercial boiler at one of the sheltered dwellings. He regarded it as important to respond urgently to that alert so that the elderly residents in the dwellings were not left in the cold. The plaintiff knew from the alert what the precise nature of the problem was and went to the location. He understood that the fault lay in rotary blades behind a panel. In order to correct the fault, he had to take off an ash can behind which there was a panel which when removed would give him access to the rotary blades. The plaintiff was at least familiar with removing the ash can because he had been shown how to do that task by two employees of the original contractor. The ash cans had to be emptied every few days on all of the commercial boilers so some training on that issue at least had been essential. This was the only training he received in relation to working on the commercial boilers.

[4] After the ash can had been safely removed, the plaintiff turned his attention to the panel, which was secured in place by four nuts, one close to each corner. It was as he was loosening one of these nuts, low on his left side, that the accident happened. He was using a socket wrench of the sort he himself provided for his domestic boiler work. The head of the wrench fitted satisfactorily over the nut but as he turned it, using only his left hand, the wrench slipped off the nut which was unexpectedly stiff and he sustained a very bad laceration to two knuckles of his left hand. That happened because there was a sharp steel edge with which the back of his left hand came into contact when the head of the wrench slipped off the nut.

[5] It is the plaintiff's case that the defendant is liable for this accident for three main reasons:

(i) Contrary to statutory requirements and the employer's duty to him, the defendant had not carried out a risk assessment for work which was to be done on the commercial boilers before requiring the plaintiff to service and repair them.

(ii) Contrary to statutory requirements and the employer's duty to him, the defendant had not provided him with the proper equipment to remove the nut, in this case, a longer wrench which would have given him more leverage to turn the stubborn nut.

(iii) Contrary to statutory requirements and the employer's duty to him, the defendant had not provided the plaintiff with proper protective equipment, especially Kevlar (or heavier) gloves which would have stopped the sharp edge cutting open his hand.

[6] For the plaintiff, Mr O'Hare KC, submitted that the employer's duty is absolute and does not include a test of reasonableness or foreseeability. He relied on

Muckman on Employer's Liability, 18th Edition, which contains the following at section 6.29-6.31:

> "6.29 In *Boyle v Kodak Ltd* [1969] 2 All ER 439, the House of Lords held that a defendant employer could not exonerate himself from liability for a breach of statutory duty unless the acts that constituted the entirety of the breach of statutory duty were wholly brought about by the claimant employee. If they were, there is no liability, so the question of contributory negligence does not arise. If they were not wholly brought about by the claimant, there is automatically fault on the part of the employer (whether negligent or not) from the mere fact of breach of their duty, and there must be an apportionment to the employer of some of the blame.
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> 6.30 In *Jayes v IMI Kynoch* [1958] ICR 155, the Court of Appeal reached a contrary view but without *Boyle v Kodak* being cited in argument before it. This decision was not followed up to the point of its careful dissection and laying to rest by the Court of Appeal in *Anderson v Newham College of Further Education* [2002] EWCA Civ 505, [2003] ICR 2112 as per incuriam. Sedley LJ, referring to the binding decision in *Boyle v Kodak*, stated that the House of Lords held that to escape a breach of its statutory duty, the defendant had to establish that the claimant was wholly to blame and that the defendant had done all that was reasonable to ensure compliance. Both limbs need to be satisfied and the last edition of this chapter erroneously states that these were alternatives ("or" being used in error). The case was authority for the high standard required to shift the statutory duty from the defendant to the claimant and that, where such a shift was achieved, there was no question of contributory negligence because there was no blame on the defendant to be apportioned.
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> 6.31 The imposition of such a high standard reflects the decision to impose such a duty in the first place. Hence, in a breach of statutory duty case, the court has to have very clearly in mind the reasons why the duties that go beyond best endeavours are provided in the particular statute. In *Staveley Iron and Chemical Co Ltd v Jones* [1956] AC 672, Lord Tucker stated at 648:

> 'In Factory Act cases the purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute.'"

[7] Mr O'Hare further relied on the authority in this jurisdiction of *Fulton v Vion Food Group Ltd* [2015] NICA 10, in which the court dismissed an appeal by a plaintiff from a finding that the employer had not been in any way in breach of its statutory duty to provide gloves to protect him from injury. At para [35] of that judgment, which obviously concerned different facts to the present case, the court stated:

> "[35] In those circumstances, in substance and reality, we find that the court was correct to conclude that the accident was solely due to the fault of the plaintiff to the extent that he was the sole author of his own wrong. The learned trial judge concluded that nothing was done or omitted to be done by the employer which caused or contributed to the accident. In short, there was no fault on the part of the employer which went beyond or was independent of the wrongful act of the plaintiff in failing to implement the system of reporting and responding to defects in the glove."

[8] For the defendant, Mr Ringland, conceded that the statutory duties had been breached but submitted that the gap in the plaintiff's case was in the area of causation. His contention was that no breach of the employer's duty played any causative role in the injuries suffered by the plaintiff in January 2020. In short, this experienced plumber was loosening a nut as he had done thousands of times before. In this context, the difference between a commercial boiler and a domestic boiler was neither here nor there. On all of the evidence, including the expert witnesses for both the plaintiff and the defendant, the defendant should not be held to be at fault.

[9] Dealing first with the issue of risk assessment, Regulation 3(1)(a) of the Management of Health and Safety at Work Regulations (NI) 2000, requires employers to carry out risk assessments. In this case, however, I am satisfied that the failure to carry out that assessment had no impact on the circumstances of the plaintiff's injury for two main reasons:

(i) Both expert witnesses, Mr Ferris for the plaintiff and Mr Cosgrove for the defendant, agreed that even if such a risk assessment had been conducted, the loosening of a nut on the panel would not have featured in that assessment. That is because the loosening of a nut is not an action which would merit mention in an assessment.

(ii) The plaintiff accepted, correctly, that he had loosened nuts thousands of times in his working life. He, himself, did not and still does not regard it as a task which is in any way risky or challenging.

[10] Strong support for that proposition came from the plaintiff himself, because after he suffered his injury and had to leave the premises to attend hospital, he rang his 18-year-old apprentice to get him to complete the task. I accept that on one view this shows the plaintiff's commitment to safeguarding the elderly tenants of the sheltered dwellings, but I do not believe that he would have made that call to his apprentice if he had thought, even for a second, that he was putting the apprentice at risk by asking him to complete the task.

[11] Dealing next with the question of failure to provide proper equipment, the plaintiff relies on Regulation 4(3) of the Provision and Use of Work equipment Regulations (NI) 1999 and contended that there was a failing on the part of the defendant to ensure that work equipment was used only for operations for which, and under conditions for which, it was suitable.

[12] On this issue, I am also against the plaintiff for reasons which I summarise as follows:

(i) On the evidence of both engineers, the wrench which the plaintiff used could easily have been handled in such a way as to do the job safely. For instance, instead of using only his non-dominant left hand, he could have held the head of the wrench in place over the nut with that left hand and turned the wrench with his right hand. In other words, he did not need a longer wrench (or an extension bar) for this task.

(ii) Mr Ferris, giving evidence for the plaintiff, could not say that the wrench which the plaintiff used was inappropriate or unsafe. There was no evidence from the plaintiff or anyone else that the nut was irregular or a danger of any sort. It was just stiff. In addition, the plaintiff had used the same tools to remove casings on other biomass boilers during this period between the departure of one commercial contractor and the arrival of the next.

[13] Dealing finally with the issue of personal protective equipment, the plaintiff relies on Regulation 4 of the Personal Protective Equipment at Work Regulations (NI) 1993 and the Management of Health and Safety at Work Regulations (NI) 2000. On this issue, I am also against the plaintiff for the following reasons:

(i) Mr O'Hare cross-examined Mr Cosgrove on the basis, which Mr Cosgrove accepted, that there is always a risk that a wrench might slip off a nut. Mr Cosgrove also accepted that the rationale for the statutory regime is that accidents happen, even to careful employees, not just to those who are momentarily careless or who fail to look out for and protect their own safety. On that basis, it was submitted that there was a duty to provide gloves,

especially where, as here, there was a sharp metal edge in the vicinity. I do not accept that that contention can be correct. It would mean that in every case where a plumber (or joiner etc) uses a wrench anywhere near a sharp edge, there would be an absolute duty on an employer to provide heavy gloves. And, if that was correct, every aspect of such work would surely have to be covered by a risk assessment even though the engineers in this case agree that the specific task which this plaintiff was engaged on would not be referred to in a risk assessment.

(ii) This case would be very different it the plaintiff's injury had occurred when he was further into the repair of the commercial boiler which, it was agreed, has more and larger mechanical parts than a domestic boiler. That aspect of the repairs would require much closer scrutiny and care, but the plaintiff's injury was suffered before he got to that point in this exercise.

(iii) The expert evidence was that any experienced boiler engineer, such as the plaintiff, would instinctively and automatically know from his training and background to risk assess tasks which they were involved in even if there was no formal employer's risk assessment. The plaintiff did not strike me as being somebody who was foolish or sloppy or careless, nor was there any record of him being injured at work over the previous number of years or of having been cautioned or advised about taking excessive risks during the early part of his employment. Despite that acquired knowledge, it did not occur to the plaintiff at any point before his accident, that he needed gloves which were heavier than the gloves provided to him by his employer on that day. Nor, apparently, did it occur to him to advise his apprentice that he should not himself try the task without heavier gloves.

[14] A major contention advanced on behalf of the plaintiff, affecting all three of the issues on which this judgment turns, was that the defendant's attitude to health and safety was incompatible with the strict statutory regime. For example, the defendant's health and safety policy placed responsibility on the senior management team for developing, updating and implementing the health and safety policy. Despite this, the defendant did not maintain a risk assessment register, nor did it ensure the plaintiff received adequate training, nor did it properly promote safe working practices. Moreover, the plaintiff's contract of employment imposed on him, not on the defendant, the obligation to provide his own tools. For the defendant, evidence was given that this is not an unusual approach for employers to take. More significantly, in the context of this case, no challenge was made by the plaintiff to the evidence given by Mr Blair, a supervisor, that the defendant had a number of suppliers in the general area where the plaintiff worked, who he could go to at any time and obtain equipment such as gloves up to a guideline cost of £150. On the evidence, the plaintiff took advantage of that system and regularly bought gloves on the company account, but only lighter gloves of the sort typically required for working on domestic boilers. In other words, if the plaintiff thought, which he

did not, that he needed heavier gloves, he was free to get them on 2 January. They were readily available to him.

[15] I do not accept the plaintiff's contention that this practice adopted by the defendant reverses the onus or burden for health and safety, in the context of this case at least. Again, I emphasise it would be different if the accident had occurred when the plaintiff was repairing the inner workings of the commercial boiler for which he needed better tools or improved protection, but that is simply not what happened here. He had not yet got into the inner workings of the boiler. He was on his way to do so by removing the panel when the accident happened but had not got that far.

[16] Authorities, such as those cited at paras 6-7 above, emphasise that the onus on employers to protect their employees is not easily met. And, in this case, there was no risk assessment carried out at all. Presumably that was because the defendant was moving from one commercial contractor to another, but the reason does not matter. The problem for the plaintiff is the agreed expert evidence that even if there had been a risk assessment, the removal of this nut would not have featured or been identified as something problematic for which the plaintiff needed to be protected while doing the task.

[17] The plaintiff's claim for damages was only instigated in March 2021 when he had left his employment under unhappy circumstances. The previously good working relationship which had been established from 2014 deteriorated during 2020 with the plaintiff receiving a formal written warning. Evidence was called about that which led, in turn, to evidence that the plaintiff had given wholly contradictory accounts about the effect which his injuries had on him. In particular, he gave inconsistent accounts of the effect which the injury has had on his ability to continue to fly fish, a sport at which he is very accomplished and internationally recognised. The different accounts which he gave cannot be reconciled.

[18] The development of the case in this way was unfortunate because while I do not find for the plaintiff on liability, I am satisfied that he was a reliable, conscientious employee, on whose shoulders an extra burden was placed in late 2019 and early 2020 in relation to the commercial boilers. And, I note that he received no extra pay for carrying that burden for some months.

[19] I note one further point – to the extent that the plaintiff complained about some residual limitations in the movement of his fingers due to the accident, the evidence of both medical experts was that he can reduce that problem significantly by exercises of the sort which he was advised of in early 2020 when he received hospital treatment and again in court.

[20] Having considered all of the evidence, I find for the defendant. I find that no negligence or breach of statutory duty causing or contributing to this accident has been established against the defendant and I dismiss the plaintiff's case.