[2008] NIQB 68 | *Ref:* **HIG7190**

Judgment: approved by the Court for handing down | *Delivered:* **29/5/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

ALAN LAVERTY

Plaintiff;

-v-

MICHAEL McQUOID CONSTRUCTION

First Named Defendant;

-and-

ASHLEY DECORATORS

Second Named Defendant;

-and-

LEO MATHESON CONTRACTS LIMITED

Third Named Defendant.

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HIGGINS LJ

[1] On 12 December 2002 the plaintiff was injured when a manhole moved when he placed his foot on it and his leg descended into the manhole chamber as a result of which he sustained a serious laceration to his right leg. Damages have been agreed in the sum of £10,000. The second and third defendants stand together and accept that the manhole cover was under their control and that they were responsible for its defective state. The issue is whether they alone are liable for the agreed damages or whether they share responsibility with the first defendant and if so in what proportion.

[2] The accident occurred in an alleyway at the rear of Valencia Place in Newcastle, County Down where housing was being renovated by the second and third defendants on behalf of the Housing Executive. The second defendant was said to be the main contractor and as they and the third defendant stand together I shall refer to them jointly as the main contractors. The first defendant described himself as a plasterer contractor who agreed with the main contractors to undertake the plastering work during the contract and agreed the hourly rate to be paid for that work. He was to provide the plasterers and plasterers assistants or labourers to carry out the work and to pay them weekly for the hours they worked.

[3] The plaintiff is a plasterer and has been for 26 years. From time to time the first defendant engaged him in plastering work at various sites. The plaintiff said the first defendant would engage him at a slightly lower hourly rate than that agreed with the main contractor and thus the first defendant made a profit. The plaintiff would be paid at the end of the week by the first defendant based on the number of hours worked by the plaintiff during that week. The first defendant said he would get this information about the number of hours from the foreman of the main contractors and pay "his employees" accordingly. The first defendant was not consistent in how he regarded workers in the position of the plaintiff. He referred to them as "self-employed to me". On another occasion he stated that "he had no employees" and later spoke of "any one employed by me" and "one of my men". He accepted that he had employers' liability insurance, but claimed this was "what the insurance company sold him". He told the insurance company he had 5 or 6 men working as "self-employed men". At the same time he maintained he had no employees as he did not pay holiday money nor did he employ such people for a set qualifying period of weeks nor did he pay them holiday money. He stated that anyone employed by him would have 18% deducted from their wages and he accounted for that amount to the Inland Revenue. He agreed that he supplied these workers with a hard hat and a yellow protective outer coat although he did not supply the plaintiff as he had his own. It was the first defendant's responsibility to introduce such men to the foreman whereupon he left them "in their capable hands". He did not become involved in co-ordinating with other trades. He did however advise his men to be careful when out and about and around the site. However he relied on the main contractor in relation to health and safety matters.

[4] Not only was the first defendant inconsistent but evasive and sought to distance himself from such persons that he engaged. The plaintiff was equally evasive and both displayed a marked reluctance to say too much about how this employment work-scheme operated. The first defendant deducted 18% from the plaintiff's wages (and from other such persons) and gave him and them a Form FC60, which they would then produce to the Inland Revenue for tax purposes.

[5] The plaintiff maintained he commenced work on a Monday and was injured on the third day about 12.30 pm. The 12 December was a Thursday. The plaintiff stated he was phoned by the first defendant at the end of the previous week and asked if he was available the following week. He met the first defendant at the site on the first day and was introduced to the foreman of the main contractors. According to the plaintiff the foreman told him what plaster work he wanted carried out. The plaintiff stated that as far as he was concerned the first defendant left the site. He said he received no instructions from the first defendant nor did the first defendant inspect the washing facilities or supply gloves or creams or look at the exits or accesses to the site.

[6] The first defendant said he went that after introducing the plaintiff to the main contractor's foreman he went to speak to other workers he had arranged to work on the site. It was not revealed what their trade was. The plaintiff then proceeded to work on plastering a porch. He brought his own plastering equipment namely a trowel but the plasterer and other materials and a cement mixer were provided by the main contractors. The plaintiff said he said he spoke to the foreman of the main contractors each day and was told by him the work that he was to carry out. He worked daily from 8.00 am to 4.30 pm. The plaintiff acknowledged that if the first defendant had asked him to leave Valencia Place and go to another job on another site he probably would have done so. The first defendant also confirmed that if he asked the plaintiff to move to another site he would have to do so.

[7] About 12.30 pm on 12 December the plaintiff had occasion to leave one of the houses in Valencia Place by the rear yard. It was his intention to turn left and proceed along the alleyway to the green door shown in photograph 1 where he intended to turn left again and make his way to the compound for materials. This route led to Valencia Place, the compound being 300 yards away on that roadway. Why he simply did not go via the front door and porch he was allegedly working at, was not revealed. After the plaintiff walked through the door he stepped on the manhole cover which slid and as a result he fell into the chamber. A fellow worker phoned the first defendant to report what had happened to him. The first defendant phoned the plaintiff that evening to make enquiries and called with him the following Friday, which would have been his pay day. The plaintiff said that the first defendant sent his pay by cheque on that Friday. He accepted that he was on benefits at that time and had planned to 'sign off' on the Friday of the week in which the accident occurred. The plaintiff remained off work until early in the New Year when he returned to the same site however. However, on that date he and all the other workers were laid off, for unrelated reasons. There was no accident book record of the accident nor was there any mention of an accident book. The plaintiff stated that he has worked for the first defendant since 2003, though not in recent years.

[8] The plaintiff sued all three defendants. In his statement of claim delivered on 8 February 2005 he alleged at paragraph 2 that he was employed by the first defendant who was a building contractor with premises at Roghal Park, Downpatrick. It was also alleged that the third defendant was the main contractor on the site and that the second defendant was the sub-contractor. In paragraph 4 he claimed that he fell into the manhole chamber whilst in the course of his employment with the defendants. It was further alleged that this occurred by reason of the negligence and breach of statutory duty of the defendants and each of them. The breach of statutory duty involved breaches of Regulations 12 and 13 of the Workplace Health and Safety and Welfare Regulations (Northern Ireland) 1993 and Regulations 5,6 and 26 of the Construction (Health Safety and Welfare) Regulations (Northern Ireland) 1996. The plaintiff relied on the particulars of negligence as constituting the breaches of the five Regulations. The second defendant denied inter alia that it was a sub-contractor. The third defendant denied that the plaintiff was employed by the first defendant and that the third defendant was the main contractor. Neither the second or third defendant pleaded to the allegation that they were employers of the plaintiff and the first defendant denied that he employed the plaintiff in any capacity. All alleged contributory negligence against the plaintiff but this was not pursued at trial. No issues were raised during the trial about the nature or extent of the pleadings.

[9] Subsequent to the pleadings referred to, a second statement of claim, addressed to the first defendant only, was delivered on 30 March 2006. This was in the same terms as the first statement of claim. A defence by the first defendant to that statement of claim and served on 12 April 2006, denied that he employed the plaintiff in the alleged or any capacity.

[10] On 15 May 2008 (several days before the hearing) the first defendant sought a contribution and indemnity from the second and third defendants on the ground that they were responsible for the direct supervision instruction and effective employment of the plaintiff at all material times. In addition the first defendant alleged that the second and third defendants were the occupiers of the relevant site and were negligent in the supervision, instruction and effective employment of the plaintiff or in the inspection, supervision, control and keeping safe to working operations and in an about the occupation and keeping safe of premises, the site or the manhole.

[11] There is no evidence of the plaintiff having any contact with the third defendant. There is evidence that the plaintiff had contact with the second defendant through his evidence, uncontradicted, that he received instructions from Joe Cunningham, the second defendant's foreman, who did not give evidence.

[12] The thrust of the submissions made by counsel on behalf of each party related to whether the plaintiff was employed by one or more of the

defendants. It was agreed that the analysis of the law as presented by Mr D Fee QC who with Mr Morrissey appeared on behalf of the plaintiff, was correct. In this regard reference was made to Lane v The Shire Roofing Company (Oxford) Limited 1995 PIQR P 417 in which the "economic reality" test, which has found favour in the United States of America, was mentioned. It was submitted that the plaintiff was entitled to succeed against all three defendants but the reality was that responsibility rested with the second and third defendants. He also submitted that while the first defendant who employed the plaintiff had certain duties that were non-delegable the real responsibility in this case rested with the second and third defendants. The first defendant was entitled to rely on the main contractor. He submitted that the plaintiff was entitled to succeed against all three defendants but that there was an issue as to whether the first defendant if liable was entitled to an indemnity against the second and third defendants.

[13] There are numerous authorities relating to the question of the status of workers vis a vis employers. These cases demonstrate that there are many factors to be considered. What factors will be relevant to a particular case will depend on the circumstances of that case as will the significance and priority of those factors. Some of the cases are not in the field of Health and Safety at Work. They may relate to questions of entitlement to pensions, benefits or tax advantages which depend on whether the person was employed or otherwise. Many in the field of Health and Safety relate to whether the worker (usually the plaintiff) was an independent contractor or an employed person. That is not the issue in this case. Here the issue is whether the plaintiff was employed by the first defendant or the main contractors or both. There are features of the evidence of the plaintiff suggestive that he was an independent contractor, but these points were not pursued. However as was observed in Lane the nature of employment has changed in recent years and there are more self-employed, as well as temporary and part-time workers and also shared employment all of which brings advantages to all concerned. Regardless, safety at work remains a constant and central issue.

[14] In Lane's case the Court of Appeal referred to the approach of the courts in the United States of America where the question of employment status of a worker is answered by asking "whether the men were employees as a matter of economic reality". The Court of Appeal recognised that the answer to that question may cover much of the same ground as the 'control test'. I do not understand the 'control test' to have been substituted by the 'economic reality test'. Rather the court emphasised that the element of control will be important. This involves who lays down what work is to be done, the ways in which it is done, the means by which it is executed, the time when it is done, who engages the men or the team (that is who hires and fires them) and who provides the material, plant, machinery or tools. However the control test may not be decisive in the context of some skilled workers who can determine how they should carry out their work. In those cases the

question whether a person is an employee may be answered by asking whose business was it – in other words was the worker carrying on his own business or was he carrying on that of his employer.

[15] In the context of this case the relationship between the first defendant and the main contractors is important. It is quite clear he was the subcontractor engaged to carry out the plastering work at the Valencia Place site, which he fulfilled by engaging and supplying skilled plasterers such as the plaintiff. He negotiated a price for the work, whether hourly, daily or overall and paid the plasterers on the basis of days and hours worked. He controlled when they arrived on site and introduced them to the foreman of the main contractors who merely informed them of the location of the areas that required plaster. Like the plaintiff they were skilled tradesmen who required no instruction how to perform their work. They brought their own tools and used material supplied to them. The fact the materials were supplied by the main contractors did not alter the nature of the relationship between the plaintiff and the first defendant. The first defendant had the authority to require the plaintiff to leave the site and go to another site to perform a similar operation. The overall evidence satisfied me that the plaintiff was employed by the first defendant who owed him a duty of care both under the common law and by statute.

[16] The nature of the relationship between the plaintiff and the main contractors was limited. The only function performed by the main contractors was to tell the plaintiff what area to plaster on a particular day and to provide the raw materials and a cement mixer. The provision of the material and the mixer added little if anything to the relationship between the plaintiff and the main contractors. They had no control over how long he might remain on site and certainly no control over how he carried out the plastering. This evidence satisfied me that the plaintiff was not an employee of the main contractors but was permitted on site as the employee of the sub-contractor, the first defendant.

[17] That the duty of care owed towards the plaintiff had been breached was not in dispute, rather who was responsible for it. The first defendant's attitude was that he introduced the plaintiff to the foreman and thereafter he was the responsibility of the main contractor. As Mr Maxwell put it – 'he washed his hands of them'. However a main contactor may owe a duty of care to employees of a sub-contractor. If the occupier of the site he would owe a duty under the Occupier's Liability Act. However this was not pleaded. It has been held that non-employers can owe a duty of care analogous to those owed by an employer particularly where the non-employer is engaged in operations which may affect the sub-contractor or his employee – see McArdle v Andmac Roofing Co 1967 1 AER 583. In the instant case it was not disputed that the main contractor was responsible for the manhole and cover. It was in a defective condition and potentially dangerous to any person

engaged in working operations on the premises. In respect of it the main contractors owed a duty of care to all workers on the premises.

[18] The first defendant as employer is liable to the plaintiff for the injuries sustained and the first defendant is entitled to seek a contribution from the main contractor. I do not consider the first defendant can be absolved completely to the extent that he would be entitled to an indemnity. Alternatively both the employer and the main contractor are liable to the plaintiff for his injuries. In both instances the issue of apportionment is the same. Mr Maxwell submitted that the usual division is fifty per cent. The nature and location of the defect that caused the injuries are relevant and crucial in this case. It was an area largely under the control of the main contractors and somewhat remote from the employer. Therefore the usual apportionment would not be appropriate. I hold the main contractors liable to the extent of seventy per cent and the employer liable for the balance.

[19] Damages have been agreed at £10,000. Judgment could be entered on either basis discussed above. I consider it appropriate in the circumstances to acknowledge that the first defendant was the employer and has sought a contribution from the second and third defendants. Therefore there will be judgment for the plaintiff against the first defendant in the sum of £10,000. The first defendant is entitled to a contribution of £7,000 from the second and third defendants.