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Judgment: approved by the Court for handing down | *Delivered:* **08/08/07**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

ANTHONY WRIGHT

-v-

GERARD KANE
BARNISH CONSTRUCTION LIMITED

STEPHENS J

[1] The plaintiff, Anthony Wright (date of birth 13 March 1974) is now aged 33. When he was 29 years of age on 9 May 2003 he sustained a very severe injury to his left eye when a piece of wire he was required to use during the course of his employment entered his left eye in an accident at work. He was employed by Gerard Kane the first defendant. He was working on a construction site as a steel fixer. The second defendant, Barnish Construction Limited was the main contractor on that site.

[2] The plaintiff was employed by the first defendant and engaged upon the tying of reinforcing metal for a cast in situ concrete retaining wall. The foundation of the wall had been completed. It was then necessary to put and hold in place all the reinforcing bars and meshes for the retaining wall. These bars and meshes were tied in place by short lengths of wire. The reinforcement would then be encased with wooden shuttering and concrete poured in from the top.

[3] After the concrete had solidified the wooden shuttering, which was part of the temporary works, would be removed to leave the concrete wall, which was part of the permanent building works. The wire ties that were used to hold the reinforcing bars and meshes in place could also be viewed as temporary works. The purpose was to keep the reinforcing structure in its correct shape and layout and to withstand the pressures of the concrete being poured in.

[4] The plaintiff's job was to cut short lengths of light wire and then to twist them around the reinforcing bars and meshes so that they were held in position. Then to cut off the tail ends of those wires. The light wire was supplied by the second defendants and it came in rolls. There was no spool at the centre of the roll. The roll was left lying on the ground close to where the plaintiff and the first defendant were working. Each roll would contain 1,000 metres of wire.

[5] The plaintiff used "snips" to cut the wire. It was the practise to cut off a short length from the main roll and then in turn to use that short length to tie up a number of reinforcing bars and meshes. When the short length was used up then to return to the roll and cut off a further short length.

[6] The statement of claim served on 19 April 2004 alleged that:

> "On or about the 9th day of May 2003 the plaintiff in the course of his employment was cutting a length of galvanised wire when the portion of wire which remained wrapped around the spools sprang up and struck the plaintiff's eye."

[7] There were a number of things which were recognised on behalf of the plaintiff as being incorrect in the statement of claim. For instance the wire was not wrapped around a spool. Importantly however it was common case that the roll of wire was on the ground and the plaintiff was standing beside it. Accordingly for the wire to injure his eye in the manner alleged in the statement of claim it had to spring up a distance of approximately 5 feet. The plaintiff maintained that was the way he recollected that the accident had occurred. Not that he assumed that it occurred in that way but that he recollected it occurring in that way. At a joint engineers inspection which took place on 1st November 2006 it was recognised that it was just physically impossible for this wire to spring up in that way. The evidence of Mr Wright, consulting engineer, retained on behalf of the second defendant, was to the effect that this wire was not under tension. It was docile without any great spring. If left flat on a table the coil would not expand or spring apart. It was self-evident from the photographs of the unrestrained coil on the ground that this was so.

[8] The engineers inspection occurred on 1st November 2006 but when the plaintiff came to give evidence on 18 April 2007 he gave an account of how the accident occurred which was different from that set out in the statement of claim. I granted leave to amend the statement of claim which in its final form alleged:

> "On or about the 9th day of May 2003 the plaintiff in the course of his employment was cutting a length of galvanised wire when as a result of a likely joint movement of his head and hand a portion of wire struck his eye whereby he sustained serious personal injuries, loss and damage as hereinafter appears."

[9] In short that accidentally the plaintiff had moved his head and his hands in such a way that he had put a piece of wire into his eye. The plaintiff's evidence was to the effect that he could now clearly remember that that was the way the accident had occurred. It was not a case of him rationalising how the accident must have occurred but rather that he could positively remember that that was how it did occur.

[10] There were no witnesses who saw the accident occurring but it is quite clear that a piece of wire did enter the plaintiff's eye during the course of his employment. It is for the plaintiff to establish how that occurred. He can do that in a number of ways. The first is to describe it from his own recollection. The second is to accept that he does not recollect the precise mechanics of the accident but rationalising the events as best he can it probably occurred in a particular way. Latitude in the description of the events being given to the plaintiff taking into account the undoubted shock and trauma of the accident and the plaintiff's personality which led to a degree of difficulty in giving evidence.

[11] I do not accept that the plaintiff can now remember that the accident occurred in the way he described in evidence and yet could not remember that at an earlier stage. A potential inference is that the plaintiff knew all along how the accident occurred and he was trying to suggest another mechanism for the accident which he perceived would exonerate him from any fault. I take into account the fact that the plaintiff was working and claiming benefits at the same time which demonstrates a degree of dishonesty for financial gain. On the basis of this alone Mr Ringland on behalf of the second defendant suggested that the plaintiff was an entirely dishonest person in all aspects of his life. I reject such a sweeping proposition. The plaintiff appeared to me to be a hardworking individual who on occasions was confused by questions. However I do consider that his original version of how he recollected the accident occurring was motivated by desire to improve his case and accordingly that it was deliberately false. The accident could not have occurred in the way that the plaintiff originally "remembered". I do not accept that the plaintiff ever considered that the accident occurred as he originally described. He had worked with wires of this type for many years. It would have been completely apparent to him that the accident could not have occurred in the way that he originally described. Mr Sheil, Consulting Engineer, was called on behalf of the plaintiff and he stated that it was quite obvious to him that the recoil upwards quite simply

would not occur. That the rebound was no more than 2 inches to 3 inches, not 5 feet. This was obvious to Mr Sheil. I find that at all material times it was also obvious to the plaintiff. That he chose to give an account that he knew was false. Having given one false account I cannot accept the plaintiff's evidence in court as to how the accident occurred. I am left not knowing how the accident occurred either as a matter of recollection or reconstruction. On that basis I dismiss the plaintiff's claim and find for the defendants.

[12] If I had accepted the plaintiff's evidence as to how the accident occurred I would still have dismissed the plaintiff's case. Mr Sheil, Consulting Engineer, on behalf of the plaintiff, gave evidence that if there was any process that involved the handling of coiled wire of this type near or within movement of the face then the individual concerned should be provided with safety spectacles or goggles. It was submitted on the part of the plaintiff that the failure to do so would be a breach of Regulation 4 of the Personal Protective Equipment at Work Regulations (Northern Ireland) 1993 and the common law duty of care. I leave to one side the fact that on the plaintiff's evidence the risk that materialised was the risk of accidentally putting the wire into his eye rather than any risk of the wire of uncoiling and going into his eye.

[13] Regulation 4 (1) of the Personal Protective Equipment at Work Regulations (Northern Ireland) 1993 is in the following terms namely:-

> "**Provision of personal protective equipment**
>
> **4.**—(1) Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective."

[14] As is apparent the duty applies to employees who may be exposed to a risk to their health and safety while at work. Risk is not defined but I construe it identically to a "risk" within Regulation 4 of the Manual Handling Operations Regulations 1992. The question as to whether a risk exists for the purposes of Regulation 4 of the 1992 Regulations was considered by Lord Justice Hale (as she then was) in *Koongul v Thameslink Health Care Services* [2000] PIQR P123. At page 126 of the judgment she stated:-

> "There must be a real risk, a foreseeable possibility of injury; certainly nothing approaching a probability. I am also prepared to accept that, in making an assessment of whether there is such a risk of injury, the employer is not entitled to assume that all his employees will on all occasions

> behave with full and proper concern for their own safety. I accept that the purpose of regulations such as these is indeed to place upon employers obligations to look after their employees' safety which they might not otherwise have.
>
> However, in making such assessments there has to be an element of realism … It also seems to me clear that what does involve a risk of injury must be context based. One is therefore looking at this particular operation in the context of this particular place of employment and also the particular employees involved."

That is the test that I apply in this case as to whether there was a risk.

[15] I have set out a description of the nature of the operation that the plaintiff was undertaking. I also bear in mind the plaintiff's personal attributes when considering the context of this operation in this case. In addition I have heard evidence in relation to the frequency with which this tying operation would have been carried out in the industry in general. This work of tying up reinforcing bars with metal wires is extremely common in the civil construction industry and has been so for approximately 100 years. It is very hard to estimate how frequently an employee, such as the plaintiff would cut this type of wire on a daily basis. The estimates given in this case varied from about 200-300 cuts of wire per day to thousands of times per day. In any event all such employees cut wire like this frequently on a daily basis. No witness in this case has ever seen any person performing this job wearing eye protection. There was no evidence that any small pieces of wire flew off when it was cut. There was no evidence of any previous injury or accident. Mr Gerard Kane, the first defendant, gave evidence that he has been tying steel since approximately 1974/1975. That he has worked not only in Northern Ireland but also in England, Germany and the Republic of Ireland. He has had no contact between a piece of wire and his own face. He has never seen or heard of another employee undertaking this task having such contact. He has never seen or heard of any eye injury or any facial injury. In short his experience was that there was no risk to the plaintiff's face. He also added, and I accept, that he has never received any injury to any other part of his body as a result of this operation.

[16] I accept the evidence of Mr Kane. Accordingly applying the test formulated by Lord Justice Hale and introducing an element of realism I consider that there was no risk within the meaning of Regulation 4 of the Personal Protective Equipment at Work Regulations (Northern Ireland) 1993 and accordingly there was no obligation to provide safety goggles or glasses.

[17] In addition the evidence of Mr Sheil, Consulting Engineer on behalf of the plaintiff, was that if there was any process which involved the handling of coiled wire of this type near (emphasis added) or within movement on the face then the individual concerned should be provided with safety spectacles or goggles. Mr Sheil subsequently brought definition to what he meant by the word "near". His evidence was to the effect that this meant "within inches". I hold that by implication this was what he also meant by the words "within movement of the face". It is clear from the way in which the wire was cut by the plaintiff and the manner in which he was holding it that he was doing this at a considerably greater distance than within inches of his face. Accordingly I do not consider that the work process falls within the definition of the circumstances in which Mr Sheil considered that safety spectacles or goggles should be provided.

[18] For all those reasons I dismiss the plaintiff's claim and enter judgment for the defendants.