Neutral Citation No. [2014] NIQB 47

Ref: **GIL9234 868607**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **04/04/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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LESTER COWAN

Plaintiff;

-and-

JOHN LEWIS T/AS PLANT HIRE AND CONTRACTS
and
J GRAHAM DROMORE LIMITED
and
NORTHERN IRELAND WATER LIMITED

Defendants.

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GILLEN J

Introduction

[1] In this matter the plaintiff, born on 1 January 1957, sustained catastrophic injuries on 26 June 2009. At that time he was employed by the first defendant as a labourer. The second defendant was carrying out a project at Ashley Pumping Station, Bangor on a site owned by the third defendant. In the course of the contractual arrangements between the first and second named defendant, the plaintiff had commenced working on this site on 24 April 2009 as a skilled labourer until the date of his accident. Although there are three defendants in the action, notice of change of solicitor had been served in relation to the first named and third named defendants in effect leaving the second named defendant as the real defendant in this case.

[2] The plaintiff has no recollection of the accident itself and it is clear from the evidence that there were no witnesses to the accident. In the event the plaintiff was found on the floor of the well of a storm tank where foul pumps were located.

[3] The hearing before me was to determine liability with the issue of quantum to follow thereafter subsequent to my determination on this matter. I am grateful to Mr Simpson QC who appeared on behalf of the defendant with Mr Maxwell and Mr O'Donoghue QC who appeared on behalf of the plaintiff with Mr Dornan for their diligently researched skeleton arguments on the issues.

[4] Arising out of the accident the second named defendant, on a plea of guilty, was convicted of offences contrary to Article 5(1) and 21 of the Health and Safety at Work (Northern Ireland) Order 1978 and, secondly, an offence of failing to take suitable and sufficient measures to prevent any person falling a distance liable to cause personal injury contrary to Regulation 6(3) of the Worth at Height Regulations (Northern Ireland) 2005 and Article 31 of Health and Safety at Work (Northern Ireland) Order 1978. In effect therefore the defendant was convicted of failing to conduct its undertakings to ensure that non-employees were not exposed to risks to their health or safety and failing to take sufficient measures to prevent a fall from height.

[5] The plaintiff has invoked these convictions in the course of his claim for personal injuries, loss and damage sustained by him as a result of the alleged negligence and breach of statutory duty of the defendants on the date in question. Since primary liability was never realistically an issue in this case it is unnecessary for me to visit the additional statutory breaches relied on by the plaintiff in the statement of claim. My sole concern is the matter of contributory negligence.

The evidence

[6] Much of the evidence in this case was undisputed. Two days before the accident, on 24 June 2009, GRB Systems had completed the roof decking of a storm tank on the site. Holes had been left at various points in the roof to allow fitting with lids to allow access to the chamber in the tank for various bits of equipment or personal access. Originally technocover lids had been planned to be installed. The lids should have been fitted at the same time as the decking was in place but in the event this did not happen and gaps were left in the roof. Accordingly until the proper lids were obtained, the voids had been covered with plywood sheeting. A ladder was in the access hole into the tank and even when a sheet of plywood covered the hole, the top of the ladder protruded from under the plywood. There was evidence that there were safety barriers set around the plywood on three sides but not on the side where the ladder protruded.

[7] Very shortly after 8.00 am on the morning of the accident, the plaintiff, George Jack the foreman on site and another operative of Polish extraction were placing concrete around the draw down pipe adjacent to the storm tank. Another Polish operative was driving a mini digger and placed the concrete from the bucket of the mini digger. The labourers shovelled the concrete to Mr Jack who then vibrated the concrete using a poker.

[8] Mr Jack in the course of his evidence made the following points.

(i) No operative should have been in the storm tank (where the injured plaintiff was found) unless he had instructed them. This was because of the confined space. He had a "ticket" for a confined space i.e. he had been trained for work in such an area. At one stage the witness said the plaintiff could have been down in the tank with Mr Jack but never on his own. There would be no reason for him to be there on his own. In cross-examination Mr Jack however indicated that in fact he had no recollection of the plaintiff being in the chamber and there was no need for him to be there. My conclusion was that Mr Jack was unsure about this matter and it confirmed my view that there was no absolute prohibition against the plaintiff going in to this chamber where necessary.

(ii) Accordingly the plaintiff was not prohibited from using the ladder down to the storm tank provided that he was instructed to go there and/or Mr Jack was with him.

(iii) During the concreting of the draw down pipe operation, there was a small pump in operation taking water away so that the concrete could be set.

(iv) Mr McAuley, a young trainee civil engineer, had put that pump back into the storm tank by means of a rope during this work at the draw down pipe. It would operate in the storm tank to keep ground water down which would seep into the construction area. The pump inserted into the well by Mr McAuley was small, of light weight and was put in through the open gap below the base of the storm tank by means of a rope which was then tied off at the top leaving the rope and hose protruding as well as the electric cable. The interior of the storm tank was shaped to let it go down to the base.

(v) The operation of concreting the draw down pipe involved digging around the pipe and exposing the pipe itself. It was done by means of mini digger and by hand.

(vi) The plaintiff and another operative Hugo were acting as banksmen to the mini digger driver.

(vii) This was an important task because they had to keep an eye on the digger to ensure that it did not damage the draw down pipe. Had this happened, a great deal of time would have been wasted cleaning up the site as raw sewage would be released from this pipe.

(viii) The plaintiff was a skilled labourer, able to work on his own and he was happy to leave him to take decisions about his own work on his own initiative.

(ix) There were two ladders emerging from apertures in the opening at the top of the storm tank. One ladder was the defendant's ladder and the other was possibly that belonging to the mechanical and electrical engineers who had been working in this area.

(x) There was no necessity for the plaintiff to be in this tank after the decking had been placed thereon. The probabilities were that it was him and the plaintiff who had placed the plywood over the apertures on the decking.

(xi) Mr Jack left the site during the work on the down pipe in order to take a dumper to another site at Cherrymount nearby. He expected the plaintiff to continue working at the excavation of the draw down pipe as a banksman until he returned. He expected him to abide by these instructions. He was unaware of anyone else instructing him to go anywhere near the decking on top of the storm tank.

(xii) Whilst he was away, it was Mr Jack's evidence that Mr McAuley, a student engineer, was left in charge of the men.

(xiii) He saw no reason why this work should not continue during his absence as the spoil lifted by the dumper could be placed in a spoil tip ready for removal when he returned. I found this a questionable proposition because there was no evidence of spoil in any of the numerous photographs taken at the scene of the accident placed before me.

[9] Mr Bruce, employed by John Lewis Plant Hire as a manager, gave evidence that although the plaintiff was contracted to the second defendant, the plaintiff had stayed on the site after John Lewis had finished because the site manager Neil Fawcett wished him to remain for the reason that he was a very good worker. Mr Bruce described him as a man who could do a number of jobs and was one of the most reliable men to be working with him.

[10] Mr Fawcett was the project manager with the second defendant. He also described the plaintiff as a good worker and he had asked John Lewis to let him remain because of his skills. He could be left to get on with his tasks and he believed that he could use his initiative. This witness made the following points:

(i) The plywood covering had been used because the proper lids had not yet arrived. There was no method statement written up to deal with

this risk. Such a statement should have set out how to minimise risks. There is a now a more robust system in place.

(ii) He had checked everything was in position that morning after he arrived at 7.15 am. At that stage all the holes on top of the storm tank were covered with plywood.

(iii) He confirmed that if the sewage from the draw down pipe had been punctured this would have created a very serious set of affairs and the job of banksman which was given to the plaintiff by Mr Jack was an important one.

(iv) There was no need for the plaintiff to be on the storm tank decking.

(v) Around the aperture, in addition to the plywood, there would have been barriers on three sides with the ladder emerging from the hole.

(vi) Considering the photographs before me, he was able to point out that a jacket marked the place where the plaintiff was found at the bottom of the storm tank after the accident was realised. This jacket was on the far side of a baffle wall on the opposite side of the ladder.

[11] Mr Ronan McAuley gave evidence that he had been summer placement as a trainee civil engineer in June 2009 working on behalf of the second defendant.

[12] This witness, in the course of examination in chief and in cross-examination made the following points:

(i) He had observed the plaintiff and the other men working at the draw down pipe on the morning of the accident. He himself had not been physically involved. He had removed the pump from the draw down area and placed it in the wet well in the storm tank by lowering it down with a rope through the open aperture below the surround of the storm tank. He was able to peer into the space below and check that the pump was now sitting on the ground level. It had not been lowered to the centre of the well i.e. to the deepest part of the well but there was little water left and the bulk of the water could be removed by the pump where it was placed by him.

(ii) He did not ask the plaintiff at any time to move this pump and he did not open the plywood lid to the tank at any time.

(iii) Having put the pump into the storm tank, he then returned to the excavation work at the draw down pipe. He remained in that area until the accident occurred.

(iv) He did not see the plaintiff depart from the draw down pipe area which was only a few metres away from the storm tank. However he did see him standing on the storm tank in the middle of the deck. At that stage he recalled that plywood covered all of the holes except the one through which the ladder was protruding. There were two orange barriers along two sides of that hole and a pallet along the other side. The ladder protruded out of the fourth side. There was no plywood over the hole at that time.

(v) The witness then turned his back on the plaintiff and was viewing the excavation work.

(vi) He did not instruct the plaintiff to desist from standing on the storm tank decking nor inquire of him what he was doing. He said that as he was a student he did not give orders.

(vii) The next thing he heard was a noise from the decking. It was a sound like a sheet of plywood rattling as if moved from a small height. Turning around, he then did not see anyone on top of the storm tank. He had "a bad feeling". He approached the storm deck and saw the plaintiff at the bottom of the storm tank.

(viii) He recalled the pump not being in the position in which he had placed it. It was now in the deepest part of the wet well approximately in the centre. That position would drain the maximum water out of the wet well.

(ix) At one stage the witness indicated that he did not remember if he had noticed that the pump had been moved before or after the Fire Service had arrived to rescue the plaintiff. However, subsequently, in answer to questions from me, he said that he had specifically mentioned this to Mr Fawcett after the accident. No investigation had been made as to who had moved the pump. He was certain it had been removed from its original position. He told me that he was confident that if someone other than the plaintiff had moved the pump, he would have seen that person do so. He had remained looking into the hole from the time that the plaintiff had disappeared until he was rescued. He said "logically this means that the plaintiff must have moved the pump".

(x) He recalled that prior to the accident, the foreman Mr Jack had asked something about the pump and he had told him that he had put it into the wet well. The plaintiff was in close proximity when this was said.

(xi) In cross-examination he reiterated that it was the sound of the rattle of plywood that made him turn towards the access hole.

(xii) He had not asked the plaintiff to move the pump.

(xiii) So far as the noise was concerned, he recognised that there was a chance that it was the sound of something else but it sounded to him like plywood.

[13] The plaintiff then called three firemen who had attended the scene where the plaintiff lay. None of these witnesses had made any attempt to move the pump albeit they all acknowledged that before they arrived members of the Ambulance Service and a doctor had taken up position in the storm tank. Crew Commander Robinson of the Fire Brigade Service who had been the first fireman down the ladders into the storm tank confirmed that the access by the ladder was very unsteady with lots of movement and very steep. He was constrained to secure the ladder to a greater degree himself. I have no doubt that this confirms that the ladder was a completely inadequate method of descending into the tank.

General principles governing contributory negligence

[14] Section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1948 provides as follows:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons … the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage…."

[15] Thus in order to establish contributory negligence resulting in a deduction from the award of damages a defendant must first establish on the balance of probabilities:

(i) That the claimant was at fault.

(ii) That the fault was causative of the relevant injury.

(iii) That it would be just and equitable for the damages to be reduced.

[16] As the authors of Munkman on Employers Liability 16th Edition at 6.07 observe, the key concept is the fault of the person suffering the damage as opposed to negligence simpliciter and that such fault must be considered in a comparative process with the fault of the tortfeasor:

> "One important consequence is that this allows acts or omissions that would axiomatically be considered

> negligent in a third party and sounding in damages, such as by way of momentary inadvertence, to be excused by way of no deduction for contributory negligence".

[17] Consequently, the fault of a person in a workplace is much more excusable than that of a person in other circumstances. Contributory negligence does not follow in most cases of momentary carelessness or inadvertence. Assessment of the injured person's share in the responsibility is undertaken through consideration of his or her relative blameworthiness as against the defendant's own failures and of the causative potency of the relevant act/omission (sees Munkman supra at 6.07(c)).

[18] Hence where the defendant is in breach of statutory duty, the standard by which the claimant's contributory negligence is judged is sometimes less exacting than used for ordinary negligence. Greater caution is needed before an employer can be absolved from blame. The claimant's conduct must be judged in the context of the circumstances of his work and in light of the defendant's statutory responsibility for his welfare. The reason for this is that Parliament has placed directly on the shoulders of the employer the responsibility for ensuring compliance with the duty. In Staveley Iron and Chemical Co Ltd v Jones (1956) AC 627 at 648 Lord Tucker said:

> "This is not so illogical as may appear at first sight when it is remembered that contributory negligence is not found in a breach of duty, although it generally involves a breach of duty, and that 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."

[19] Thus it is not necessarily negligent for a worker to follow the method of work accepted by his employer even if it involves obvious risk. It is not the duty of a worker to break away from the employer's methods and devise a safer system, although he may have as much skill and experience as the employer. This concept was illuminatingly discussed in the Irish Supreme Court decision of Stewart v Kileen Paper Mills Limited (1959) IR 436 at 449 where Moore J said:

> "(A court) is entitled to take into account that the action was taken by the workman in furtherance of the interests of his master and that zeal may have dulled the edge of caution."

[20] Understandably therefore it has been held not to be negligent to disregard personal danger because the worker is absorbed in work or has taken the deliberate

risk in the employer's interests (see Neill v Harland and Wolff Ltd (1949) 82 LL. Rep 515).

[21] That is not to say of course that deliberate disobedience of regulations which the employer expects to be obeyed and of the employer's own orders which it enforces will be excused.

Applying the principles to this case

[22] As Mr Simpson QC correctly conceded, the issue for me to determine is one of contributory negligence. Primary liability is clearly established by the plaintiff. Although Mr Simpson raised the issue of secundum allegata et secundum probata, (a matter that I recently visited in Savage v McCourt (unreported GIL9212) wherein I cited and dealt with the leading authority of Graham and E A Dunlop Limited (NIJB 1977 No.1) I am satisfied that the plaintiff has not fallen foul of that principle in this case. The plaintiff was unable to recall how this accident happened due to the injuries he received, but the plaintiff has clearly pleaded, and in this court proved on the balance of probabilities that he had fallen from a height into the storm tank as a result of the defendant's negligence and breach of statutory duty in failing to adequately cover holes in the storm tank and providing an inadequate means of access. I am satisfied the pleadings adequately cover that factual matrix.

[23] Turning to the issue of contributory negligence, I have come to the conclusion that the defendant has failed to satisfy me on the balance of probabilities that the plaintiff was guilty of contributory negligence. I have come to this conclusion for the following reasons.

[24] First, the circumstances of this accident are precisely the type of circumstances against which the statutory duty was directed. For no good reason other than a desire to complete the job, the task of providing proper metal lids on the storm tank was neglected even though these were due to arrive a number of days hence. No proper risk assessment of the dangers was carried out. Totally inadequate covering of the openings in the roof of the storm tank were provided notwithstanding the fact that workmen were allowed on to that decking. Moreover, for no good reason whatsoever an inadequately secured ladder was provided as a means of access into the storm tank. These egregious acts of negligence and breaches of statutory duty are classic instances where the courts should be wary lest by a finding of contributory negligence it emasculates the very mischief which these statutory duties are meant to address.

[25] Several witnesses made it clear that this plaintiff was a keen, conscientious and willing employee anxious to get on with his job and a man in whom his foreman could repose confidence that he would use his own initiative. There is a need to protect workmen against such zeal and enthusiasm. That was not done in this instance.

[26] Given the defects that existed on this storm tank decking, I am satisfied that the defendant failed properly to instruct or warn him as to the dangers. It was clear to me that he was not prohibited from working in this area. Evidence of that is found not only in the absence of any express instruction or prohibition to this effect from the foreman, but also in the fact that the man who was left in charge of him, Mr McAuley, made no attempt to warn him off the decking or even to make an enquiry as to why he was there. I am satisfied that this storm tank was a place of work from which the plaintiff had not been prohibited to attend and which he was perfectly entitled to visit under the system of work then operating.

[27] I consider that on the balance of probabilities, this plaintiff had decided to enter the storm tank in the course of his employment in order to adjust the pump previously inserted by Mr McAuley in order to ensure that it was at the deepest part of the well and thus most effectively deployed. I can conceive of no other reason why such a conscientious worker as this man would have entered the storm tank at this time. Having watched Mr McAuley carefully in the witness box, I was satisfied that he was genuinely attempting to convey his firm belief from what he had observed that had anyone else moved that pump from the moment he saw the plaintiff lying in the tank until he realised its new position, he would have seen such a person do so. No one else had been in the storm tank from the moment he inserted the pump until he saw the plaintiff lying at the bottom. This proposition rhymes with a realistic and common sense reason why the plaintiff would have entered the storm tank in the first place.

[28] I am satisfied that such a task was an example of this man using his initiative in a way that was wholly acceptable to his employers and typical of his zeal and enthusiasm. His decision to move the pump to the deepest part of the storm tank was a proper act performed by him in the interests of his employer.

[29] Whilst there may have been some doubt as to whether the plaintiff had actually been with the foreman Mr Jack in this storm tank prior to the accident, I am satisfied that the system of work was such that Mr Jack would readily have allowed the plaintiff to enter that storm tank had the need arisen and that he had placed no prohibition upon the plaintiff from doing so. This of course explains why Mr McAuley made no attempt to warn the plaintiff off the decking when he saw him there.

[30] I find the reference by Mr McAuley to the sound of plywood moving to be too ambiguous and uncertain to be of any material assistance in deciding how this accident happened.

[31] Even if I am wrong in my conclusion that the probabilities clearly point to this plaintiff entering the storm tank to move the pump to a more effective place in the course of his employment, the absence of any prohibition to enter this tank coupled with the evidence that he was a conscientious hardworking man unlikely to be time wasting, all point to the likelihood that he was entering this storm tank or

in its vicinity for a good working purpose. I am satisfied that had there been a requirement at that moment for him to be performing his duties as a banksman Mr McAuley who was in charge of him would have requested him to return to such duties. The likelihood is that there was a lull in such operations and this plaintiff characteristically was using his initiative and zeal to carry out some other work related task when he fell. The overwhelming danger created by the breach of statutory duty and negligence of the defendant has created a danger causing the plaintiff to fall and sustain his catastrophic injuries.