Neutral Citation No. [2003] NIQB 6

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

Ref:	**SHEF3775**
Delivered:	**17/01/03**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

ERIC STEPHEN McCULLY

Plaintiff;

-and-

FARRANS LIMITED

Defendant.

SHEIL J

[1] The plaintiff in this action is now aged 34 having been born on 9 November 1967. He is a qualified welder by trade. In August 2000 he commenced self-employment in a partnership with Mr Lyle driving two lorries as sub-contractors to a firm called Andersons. In the course of this sub-contract work the plaintiff and Mr Lyle drove their lorries to various sites to deliver and collect materials.

[2] On 4 August 2000 at approximately 1.00 pm the plaintiff in the course of that work met with an accident while on the defendant's premises at Mallusk. On that day he was collecting from the defendant waste cement for disposal, which consisted of liquid cement which contained some large blocks of cement. This was about the third day on which he had carried out a collection at the defendant's premises and was about the third trip which he had done that day. He followed the procedure which he had followed on the previous occasions when he had collected such waste material from the defendant's premises. He positioned his blue lorry as seen in the photograph produced to the court, which he took some weeks following the accident. That photograph shows the lorry positioned alongside a raised area of the premises. From that raised area a digger, driven by Mr Coleman, discharged

the waste material into the back of the plaintiff's lorry, which was positioned at the lower level. Although Mr Coleman was a self-employed digger driver, he had been engaged by the defendant to carry out the clear-up operation of the waste material on the defendant's premises. It is accepted by Mr Quinn, counsel for the defendant, that Mr Coleman was in overall charge of this operation and that although he was not employed by the defendant he was at all times acting in law as their servant or agent.

[3] At the time of the accident the plaintiff was climbing out of the cab of his lorry on to the boulders, as seen in the foreground of that photograph, when he slipped and fell between the lorry and the boulders, thereby injuring himself.

[4] The plaintiff alleges that on the first day when he arrived at the defendant's premises he had pulled up in his lorry in a position forward of that seen in that photograph in that the tail end of his lorry was well forward of the boulders. In accordance with his practice when he first visited premises which he had not visited before, he spoke to Mr Coleman to ascertain where and how he should position the lorry to enable discharge of the waste cement from the digger into the back of the lorry. On that first day Mr Coleman told the plaintiff to reverse as tight as he could to the wall, making it clear to the plaintiff that he would have to stop with his tail end short of the railings seen in the photograph; it was necessary to stop in that position because the digger bucket as seen photograph 8 had not sufficient reach to clear the railings so as to discharge its load into the back of the lorry. Mr Coleman did not specify whether the plaintiff should position his lorry with its off-side or its near-side to the wall. The plaintiff stated in evidence that he simply did as he was told by Mr Coleman, ie. he reversed the lorry so that it stopped in the position shown in the photograph. He had put one foot out on to the boulders and was putting his second foot out on to them when he slipped and fell between the boulders and the side of the lorry. The plaintiff alleges that there was some wet cement on the boulders, which accounted at least in part for his slipping.

[5] Mr Lyle, the plaintiff's business partner, gave evidence on behalf of the plaintiff. He had carried out the first deliveries to the defendant's premises when their firm had first got the sub-contract to do this work. He stated that on the day when he first went to the defendant's premises he pulled up his lorry in or about the same position as seen in the photograph. He asked Mr Coleman, who was working nearby, where he should position his lorry. Mr Coleman replied by stating "pretty much as you are – pull up as tight as you can to the wall – back up". Mr Coleman also instructed him to stop with the tail end of the lorry short of the railing seen in the photographs, for the reason already explained above. Mr Lyle simply did as he was instructed by Mr Coleman. On his subsequent visits to the defendant's premises he positioned his lorry in the same way with its off-side to the wall/boulders. It was never

suggested to him by Mr Coleman or by anybody else in the defendant company that he should position the lorry with its near-side to the wall/boulders. Likewise the plaintiff was not instructed by Mr Coleman or by anybody in the defendant company to position the lorry with its near-side to the wall/boulders.

[6] Mr Coleman, who was called to give evidence on behalf of the defendant, stated that it did not make any difference to him whether a lorry parked with its off-side or near-side to the wall/boulders. He accepted that he did tell Mr Lyle and the plaintiff to position the lorry "as close to the wall as possible" and accepts that he may have told them to "reverse" from the position in which they had first stopped. He stated that a number of other lorries owned by Andersons carried out this work of removal of the waste cement for disposal. He stated that many of those other drivers positioned their lorries in the same way as that done by the plaintiff and Mr Lyle, ie with the off-side, as distinctive from the near side, of the lorry alongside the boulders/wall.

[7] Mr Morrison, who was employed by the defendant, was on site on the day of this accident. He was called to give evidence on behalf of the defendant. He stated that most of the drivers engaged in this waste removal operation parked with the near-side of their lorries to the wall and that he could only remember one driver, who parked with his off-side to the wall/boulders.

[8] Mr Comerton QC, who appeared with Mr Colton on behalf of the plaintiff, submits that the defendant was guilty of negligence and breach of statutory duty causing injury to the plaintiff. He relies, inter alia, on regulation 12(1) and (2) of the Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993 (No 37). Regulation 12 provides as follows:

> "(1) Every floor in a workplace and the surface of every traffic route in a workplace shall be of a construction such that the floor or surface of the traffic route is suitable for the purpose for which it is used.
>
> (2) Without prejudice to the generality of paragraph (1), the requirements in that paragraph shall include requirements that –
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>> (a) the floor, or surface of the traffic route, shall have no hole or slope, or be uneven or slippery so as, in each case, to

> expose any person to any risk to his health or safety; and
>
> (b) every such floor shall have effective means of drainage where necessary.
>
> (3) So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause any person to slip trip or fall."

"Traffic route" is defined by regulation 2 as meaning "a route for pedestrian traffic, vehicles or both and includes any stairs, staircase, fixed ladder, doorway, gateway, loading bay or ramp." The word "workplace" is defined by the same regulation as meaning (subject to paragraph 2, which is not relevant), "any premises or part of premises which are not domestic premises and are made available to any person as a place of work ---." Although the plaintiff was self-employed on the defendant's premises, I consider that he is entitled to the benefit of the regulations. My view is supported by the statement in Munkmans "Employers Liability", 13th Edition at paragraph 12.07 where it is stated in relation to the equivalent regulations (1992) in England:

> "But it appears that an employer or an occupier will be liable for self-employed workers on, or visitors to, the premises. The regulations impose duties just by virtue of the fact that premises are a workplace, without apparent restrictions upon the persons who can claim for a breach; the liability may be akin to occupiers' liability."

As stated in Charlesworth and Percy on Negligence, 10th Edition at paragraph 11-107:

> "The duties imposed on employers (under regulation 12) are by reference to the workplace itself rather than those who work in it or the tasks they undertake. Thus the employer who occupies a workplace is equally responsible towards self-employed workers and visitors who are not persons employed, presumably including a self-employed contractor."

In Banna v Delicato [1999] SLT 84 Sheriff Morrison stated:

> "In my opinion the reference in regulation 12(3), to 'a person' must mean any person. It could not be restricted to employees or persons working there unless there was a clear indication in the regulations as a whole that such a restriction was intended. I do not find that there is any reason to import such a restriction into the provision. It is not so restricted as are other provisions. Parliament could have specified such a restriction but has not done so."

[9] Regulation 12(1) imposes a strict liability. It does not have the qualification "so far as is reasonably practicable" as appears in regulation 12(3) of the regulations.

[10] I am satisfied on the evidence in this case that the place where the plaintiff fell was a "workplace" within the meaning of regulation 2(1) of the regulations and that the boulders by their useage by many lorry drivers without dissent by the defendants constituted a "traffic route" within the meaning of the same regulation. I consider that the boulders used by the plaintiff and by many other drivers to dismount from their lorries constituted a "surface" of the traffic route which was not suitable for the purpose for which it was used. That being so, the plaintiff, having suffered personal injury, loss and damage as a result of that breach of duty, is entitled to damages.

[11] I consider that the defendants were also guilty of any negligence at common law in allowing the boulders to be used as a means of access by many lorry drivers.

[12] Was the plaintiff guilty of contributory negligence? It is clear that the plaintiff could have positioned the lorry facing the other way with the near side to the wall/boulders and that if he had done so he would not have had to climb out onto the boulders but would have descended onto firm ground. In order to leave the defendant's premises the plaintiff would have had to turn the lorry in any event to go back up the road leading out on to the main road. The plaintiff accepted that it would have been easier to have turned the lorry before receiving the waste material into the rear thereof. The plaintiff states that he was not happy with the arrangement whereby he had to step out onto the boulders. He accepts that it did not occur to him before he first reversed into that position, nor did he subsequently suggest to Mr Coleman, that it would be safer to position the lorry with its nearside alongside the loading area thereby avoiding the necessity of the plaintiff having to climb out onto the boulders. The plaintiff gave as a reason for not positioning the lorry facing the other way that there were other lorries going up and down in the vicinity and that there was a risk of his being struck if he was to climb out into

their path. It was suggested to him that usually the driver of any vehicle, be it a lorry or a motor car, parks with the nearside to the kerb and then climbs out the off-side, where there is always the problem of other traffic. The plaintiff also suggested that it was more difficult to position his lorry as close as possible to the loading area if he was parking with his nearside rather than his off-side to the wall/boulders. I find this rather difficult to accept, bearing in mind that there were wing-mirrors on both sides of the lorry, as I do the other explanations given by the plaintiff set out above. Having said that, the fact remains that the plaintiff was only following the instructions given to him by Mr Coleman although, as stated above, Mr Coleman did not specify which way round the lorry should position itself, as that was a matter of total indifference to him.

[13] In Munkmans Employers Liability 13th Edition at paragraph 29.34 it is stated:

> "It is thus not negligent for a worker to follow the method of work accepted by the 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"; see also Charlesworth and Percy on Negligence 10th Edition at paragraph 3.05.

On the facts of the present case I do not consider that the plaintiff was guilty of any contributory negligence.

[14] I now turn to the issue of damages. The plaintiff was off work for a period of 9 weeks. His net special damage has been agreed in the sum of £1,850.00. Initially on his return to work he did rather less driving than before his accident. About 6 months ago he commenced employment with an engineering firm working on the body work of lorries and doing occasional deliveries. He stated that in the course of this work he can have problems if he is using heavy tools.

[15] When the plaintiff slipped from the boulder he fell between the lorry and the boulders striking his left wrist and elbow. He sustained a comminuted fracture of the distal end of his left radius and the ulnar styloid at the left wrist which were treated by application of a cast under general anaesthetic; he is right-handed. Initially he was in great pain and could not use his left arm at all, which was in plaster-of-paris for six to seven weeks. On his return to work he had some trouble with changing gears in the lorry. I have had the benefit of agreed medical reports from Mr Elliott FRCS dated 20 March 2001 and 19 March 2001, a report from Mr Grey, Consultant Radiologist dated 22 January 2002 and a report on behalf of the defendant

from Mr Wallace FRCS dated 12 December 2000. At a fracture review on 17 November 2000 it was recorded that the fracture had healed but that the plaintiff had still some limitation of supination but he was discharged from further review. He also had some physiotherapy at Whiteabbey Hospital.

[16] When Mr Wallace FRCS examined the plaintiff on 12 December 2000 he concluded his report by stating:

> "It is entirely consistent that he would have had stiffness and soreness when the cast was removed. This has responded well to physiotherapy, again as one might expect. He still has some residual stiffness, particularly in supination. Supination loss causes greater problems than loss of other movements at the wrist, particularly in view of his line of work (a lorry driver) and his guitar playing."

The fractures had healed soundly by the time of Mr Grey's x-ray examination on 21 January 2002. Mr Elliott FRCS in his report dated 20 March 2001 of his examination carried out on 4 January 2001, records the plaintiff as stating that his left wrist was by then improving but that the symptoms became worse in cold weather and that he also had difficulty playing the guitar because of the restriction in supination. He found that there was some restriction of palmar flexation at supination but that the ranges of movement remained functional. Mr Elliott later confirmed, having seen Dr Grey's x-rays, that development of secondary degenerative change is unlikely. The plaintiff was a keen guitar player and still is. Prior to the accident he played in his church Praises Team twice every Sunday and taught a youth group on Saturdays; he practised two to three times a week. For several months following the accident he was unable to play the guitar. He is now playing again, but his wrist will slowly become painful if he plays for more than a few hours at a time. The plaintiff, who did not appear to exaggerate his injuries in any way, stated that he does have problems with his wrist in cold weather and if he attempts to lift heavy tools in the course of his work.

[17] I award the plaintiff the sum of £17,500.00 for general damages to which there has to be added the agreed net special damage of £1,850.00 giving a total award of £19,350.00. I award interest on the sum of £17,500.00 general damages at the rate of 2% per annum from the date of service of the writ of summons until the date of trial. I award interest on the £1,850.00 special damage at the rate of 6% per annum from the date of service of the writ of summons until the date of trial.

Hearing dates: 7 October and 10 December 2002

Comerton QC/Colton, counsel for the plaintiff

Quinn, counsel for the defendant