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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **13/03/2015**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

MELVIN FULTON

Plaintiff /Appellant;

-and-

VION FOOD GROUP LIMITED

Defendant /Respondent.

Before: Morgan LCJ, Gillen LJ and Weir J

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Gillen LJ (giving the judgment of the Court)

Introduction

[1] This is an appeal from the judgment handed down by Stephens J on 8 August 2014 in which he dismissed the appellant's claim for negligence and/or breach of statutory duty namely the duty under Regulation 7 of the Personal Protective Equipment at Work Regulations (Northern Ireland) 1993 (the "1993 Regulations") for a personal injury the appellant sustained whilst in the employment of the respondent. Mr Keenan QC appeared on behalf of the appellant with Mr Park and Mr Spence appeared on behalf of the respondent. We are grateful to counsel for the economy of their arguments in this matter.

Background Facts

[2] The appellant has not advanced arguments that there was any error in the findings of fact by Stephens J ("the trial judge") and thus the facts as outlined by the trial judge can be set out in relatively short compass. Where there was any conflict of evidence between the parties the learned judge preferred the evidence of the respondent's witnesses, having assessed the credibility of the witnesses by applying

the factors set out at paragraphs 12–13 of the judgment in Thornton v Northern Ireland Housing Executive [2010] NIQB 4.

[3] The appellant's evidence was that he was employed as a factory operative performing butchery work in a meat processing plant operated by the respondent in Cookstown, County Tyrone. He was working on a butchery line in the respondent's boning hall and his work included placing waste trimmings in one tray and cut meat in another. When a tray was full he was required to push it away from him. He was provided with and was wearing at his waist a scabbard in which to sheath his boning knife but he chose instead to keep the knife either in his right or left hand as he pushed a tray with both hands away from him to his right. The appellant alleged that some 45 minutes after the lunch break, as he was pushing a tray of waste onto the top part of the line, he sustained a cut through the existing hole in his kevlar glove. He stated that he could not remember what hand his knife was in because the accident all happened so fast at the time .All that he knew was that as he pushed the tray with both hands he noted his hand was bleeding.

[4] The learned judge considered the most likely explanation was that whilst the applicant was holding the knife in his right hand and using the point of the knife rather than using his hand to push the tray, the weight of the tray was such that he lost his grip on the handle of the knife and his right index finger slid up the knife coming into contact with the blade causing him to sustain a laceration with nerve and tendon damage. The court did not accept that there was any time pressure or general practice which would have prevented the appellant returning his knife to his scabbard before pushing the tray

[5] There were 6 butchery lines consisting of long tables incorporating conveyor belts. There were between 9 and 10 or up to 15 to 20 employees working on each line, with each employee performing a specific task using a knife. The meat then passed to the next employee for the next task to be performed. On the far side of the table from the employees, and slightly higher than the table, there were trays angled towards the employees, with cuts of meat being placed in different trays from waste materials. When a tray was full, the employee would push the tray further away from the table and upwards onto another conveyor which took the tray away. That conveyor formed what the learned judge described as "the top part of each line".

[6] Each line was supervised by a team leader who moved up and down the line and whose responsibilities included ensuring that the employees' personal protective equipment was being worn and was properly maintained. There was a system of randomly chosen employees being subjected to spot checks during the day by the team leader so that, by a close visual examination, the team leader could ensure that the personal protective equipment of the particular employee was in good order.

[7] All employees had their own personal knife inscribed with their name and number and were issued with personal protective equipment.

[8] The appellant was shown the proper use of the personal protective equipment when it was issued to him by Mr O'Brien, an employee of the respondent.

[9] The appellant was issued with a hard hat, wellington boots with steel toe caps, a chain mail glove for his *left hand*, a kevlar glove for his *right hand*, a chain mail apron, and a scabbard for his knife. The scabbard was worn at waist height attached to a chain link belt. The kevlar glove was designed to afford protection from a slash type cut but it would not have protected against a penetrative injury from the point of the blade of the knife. The plaintiff probably sustained a slash type injury.

[10] Both types of glove were issued to the employees each morning. Upon issue each employee was trained to, and had an obligation, to check his gloves before putting them on and to report any defect to a person in authority on behalf of the respondent. During the day the employees were trained to and had the obligation to be aware of any defects that might develop in their personal protective equipment with directions to step away from the line if they noticed a defect and to report the defect to a person in authority on behalf of the respondent. There was a team leader on each line to whom the defects could be reported. Replacement gloves were available in the boning hall as well as in the store. The learned trial judge found that if a defect in a glove was reported to a person in authority a replacement glove was provided within one or two minutes. He also found that no employee was required to work with a defective glove while a replacement glove was being obtained but rather such an employee was to stay off the line until a replacement glove was obtained.

[11] At the end of each period of work during the day, for instance before a coffee/tea break or lunch, all employees were required to put their gloves into a tray and then after the break take gloves from the tray. This meant that the employees could be wearing a different glove at different times of the day. On each occasion the system was that the employees were trained to and had an obligation to inspect the gloves before they were put on and to report any defect to a person in authority on behalf of the respondent. At the end of the day the gloves were put into the tray and washed and dried overnight in a washing machine and tumble drier by the respondent.

[12] The learned trial judge found on the evidence before him that the system in relation to the gloves was reasonable and effective. The evidence of the consulting engineer called on behalf of the appellant was that it was appropriate. There was no evidence that it was ineffective, or of defective gloves being worn or injuries being sustained as a result.

[13] The appellant began work with the respondent on 27 January 2009, (approximately 5 months before the accident) on which date he attended an induction course which included the topic of health and safety. The learned trial judge found that considerable emphasis was placed by the respondent on health and safety during that course with particular emphasis on the risks posed by the use of knives. The appellant was told to always replace his knife in the scabbard when not in use; that a knife should be directed away from the body whenever possible and that he should never cut towards his fingers, hand or any other unprotected part of his body; and that the personal protective equipment must be worn at all times when using knives. The learned judge considered that the course was a serious and sincere one emphasising risks and the precautions to be taken as regards knives and other aspects of the work, and covering employees' responsibilities which included the obligation immediately to report defects in protective clothing.

[14] Stephens J considered that, as a result of the appellant's attendance on the induction course, he knew that the knife he would be using was extremely sharp and presented risks to him and other employees; that, when not being used, the knife should always be sheaved in the scabbard provided to him; that he was to check his personal protective equipment on each occasion before putting it on and regularly during the course of his daily activities; that if he noticed any defect in his personal protective equipment he was to step away from the line and report the defect immediately to his team leader; and that, if there was any defect in his equipment, he was not to work until the defective equipment had been replaced.

[15] On the first day working in the boning hall the appellant had the health and safety contents of the induction course repeated to him before he started work. The learned judge considered that the appellant knew as a result of the induction course and his experience in employment with the respondent that working with a glove with a hole in it was dangerous, and that as soon as he was aware of the hole he should stop working, step away from the line and report the defect.

[16] The appellant gave evidence that, on the day of the accident, some 5 months after he started working in the boning hall, he had been moved from a trainee line to a main line. However the learned judge preferred the evidence of Mr O'Brien that new starts could fill in on any line and that there was no designated training line; that the appellant started work on Mr O'Brien's line; that he was moved from this line to line 4 after lunch; that the work he was doing on both lines was trimming and that he had experience of this work.

[17] The appellant also stated that the line on which the accident occurred required him to work at a speed greater than he had been used to and that he was having some difficulty in keeping up with the line. The learned judge found that the conveyors on each line operated at the same speed and, while it could not be ruled out that there were some variations in the speed of a line, in general terms there was no marked difference between the speeds of the lines. Mr O'Brien's evidence was

that the appellant's line was, if anything, slower than the line on which he had previously worked. The learned judge did not consider that the appellant established that he was under any pressure of time.

[18] The appellant stated that he had been off on his lunch break; that he placed his gloves in the tray at the start of the break and that, on his return, he took the last chainmail and kevlar gloves from the tray. He stated that upon inspecting the kevlar glove he found a substantial hole in the right index finger, bigger than a 5 pence piece but smaller than a 20 pence piece. He said that he reported the defect to Mr O'Brien but was told to work on and that he did so without reporting the defect in the glove to the team leader for his line, Mr Dinsmore. The learned judge observed that it was only on 15 May 2014, some 2 years after these proceedings commenced, that it was alleged in an "amended amended" Statement of Claim that the appellant had reported the defect before the accident had occurred. He considered that the appellant had inspected the kevlar glove before he put it on but did not accept that there was a hole in it at this stage. He accepted the evidence of Mr O'Brien that the appellant did not report any defect to him.

[19] Stephens J considered that a hole developed in the kevlar glove at some stage during the 45 minutes after he returned to work from his lunch break and that it developed before the appellant sustained his injury rather than being caused in the accident itself. He considered that the appellant knew:

(a) that there was a hole in the kevlar glove shortly after it developed,

(b) that there was an obvious defect in the kevlar glove,

(c) that he should have reported the defect and

(d) that he should have stepped away from the line.

The learned judge also considered that given the timescales involved and the nature of the work there was no opportunity for anyone on behalf of the respondent to have become aware of the existence of the hole in the glove.

The decision of Stephens J

[20] Stephens J concluded that:

(a) the hole in the glove, which occurred at some stage during the 45 minutes after the appellant returned to work from his lunch break and before the accident, constituted a breach of the respondent's statutory duty under Regulation 7;

(b) the appellant's failure to report the defect was a breach of his statutory duty under Regulation 11;

(c) the respondent took every practical step to ensure the health and safety of the appellant and so the appellant's case in negligence failed; and

(d) a breach of Regulation 7 having been established, the burden was then on the respondent to establish that the only act or default of anyone which caused or contributed to the non-compliance was the act or default of the appellant himself. The learned judge considered that the respondent had discharged that burden; the only person who knew of or who could have known of this obvious defect was the appellant and he did nothing about it.

[21] He therefore dismissed the appellant's action for negligence and/or breach of statutory duty on the basis that, while there had been a breach by the respondent of its statutory duty under Regulation 7 of 1993 Regulations, the only act or default of anyone which caused or contributed to the non-compliance with Regulation 7 was the act or default of the appellant himself.

The Appeal

[22] The appellant now appeals on the ground that the learned judge erred in finding that the acts and omissions of the appellant constituted a complete defence to the respondent's breach of statutory duty. The appellant has not advanced arguments that there was any error in the findings of fact in the lower court.

Statutory framework

[23] Regulations 7 and 11 of the 1993 Regulations provide as follows;

> "7. (1) Every employer shall ensure that any personal protective equipment provided to his employees is maintained (including replaced or cleaned as appropriate) in an efficient state, in efficient working order and in good repair.
>
> 11. Every employee who has been provided with personal protective equipment by virtue of regulation 4(1) shall forthwith report to his employer any loss of or obvious defect in that personal protective equipment."

Principles relating to Regulation 7 of the 1993 Regulations

[24] Our attention was conscientiously drawn by counsel to the leading authorities governing the principles dealing with the interpretation of Regulations 7 and 11. These included:

1. Galashiels Gas Co. Ltd v O'Donnell (1949) AC 275
2. Ginty v Belmont Building Supplies[1959] 1 All ER 414
3. Ross v Associated Portland Cement Manufacturers (1964) 1 WLR 768
4. Boyle v Kodak Ltd (1969) 1 WLR 661
5. Stark v Post Office (2000) ICR 1013

[25] To these can be added:

6. Manwaring v Billington (1952) 2 ALL ER 747
7. Brumden v Motornet Service and Repairs (2013) EWCA Civ 195
8. Anderson v Newham College of Further Education [2002] JCR 212
9. Stephen Robert Parker v PFC Flooring Supplies (2000) WL 1675161

[26] From this array of authorities the following principles can be harvested:

(a) Regulation 7 contains a deliberate expression of legislative intent. It imposes an absolute duty on the respondent. The word "maintained" denotes the continuance of an efficient state, efficient working order and a state of good repair (see Galashiels case per Lord MacDermott at p287).

(b) The plaintiff establishes a prima facie case against the employer by proving the act of non-compliance. He need prove no more. No burden lies on him to prove what steps should have been taken to avert the non-compliance.

(c) The purpose of imposing an absolute duty under Regulation 7 includes rendering the task of an injured employee easier by simply requiring him to prove two matters: that the personal protective equipment was either not in an efficient state or in efficient working order or in good repair; and that this failure caused or contributed to the injury. A further social purpose of Regulation 7 is to place on the employer the risk of accidental non-negligent injury inherent in the use of personal protective equipment that is not in an efficient state or in efficient working order or in good repair.

(d) Where there has been a breach of Regulation 7, the compensation owing to the employee may be reduced if there is contributory negligence on the part of the employee. For example a failure by an

employee to comply with Regulation 11, as well as negligence on the part of the employee, is "fault" within the meaning of section 2 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948 which may reduce the damages recoverable.

(e) However in very limited circumstances, the actions of the employee can amount to a complete defence for the employer even if the employer is in breach of Regulation 7. Boyle v Kodak Ltd contains the seminal principles on this aspect.

(f) To escape liability for such a breach of statutory duty where a workman has been injured, the employer must prove not only that his breach was co-extensive with a breach by the injured workman of the same statutory duty, but that the employer had done all he reasonably could to ensure compliance by the employee.

(g) We pause to observe that this is not to say that even had the plaintiff in the instant case been blameless the defendant could have escaped liability by proving he had done all he reasonably could. That is the burden of absolute liability. The employer only escapes if he is able to shift the entire blame for a breach of statutory duty on to the plaintiff. The standard of proof is a high one. However this principle avoids the absurdity of an employer, having done all he can reasonably be expected to do, being liable to a workman who has deliberately disobeyed his employer's instructions or orders and thereby caused the employer to be in breach of the regulation. As Boyle v Kodak Ltd, makes clear, only in those circumstances has the law introduced a qualification of the employer's absolute liability. To say "You are liable to me for my own wrong doing is neither good morals nor good law".

(h) Thus in Manwaring v Billington, in the context of the relevant Building Regulations, the plaintiff had been instructed by his employers not to ascend any ladder without putting sacking under it to prevent it from slipping and without lashing it at the top. He disobeyed this instruction, ascended a ladder without taking these precautions and sustained injuries when the ladder slipped. His action against his employers failed. Lord Morris of Borth-y-Gest said, at p. 750:

> "The mere fact that the employer must be held to have been in breach of the Building Regulations would not in this case by itself warrant our concluding that the judge's holding was wrong. Particularly is this so when it is remembered that the employer only

> became in breach of the regulations because of the omissions of the plaintiff to perform duties which were properly and reasonably assigned to him. This employer could not be expected personally to fix every ladder used by his men during painting operations, nor personally to supervise every operation in the course of which the use of ladders was necessary. If he gave clear and adequate directions as to lashing and securing ladders, he was doing what a reasonable employer was entitled to do. I would deem it incongruous and irrational if, on the facts as found by the learned judge, the plaintiff could, in effect, successfully say to his employer:
>
> > 'Because of my disregard of your reasonable instructions I have brought about the position that you are in breach of your statutory obligations, and so I claim damages from you because of such breach'."

(i) Accordingly if the employer, faced with strict liability legislation, can prove that the only act or default of anyone which caused or contributed to the non-compliance was the act or default of the plaintiff himself, he establishes a good defence. Unless the employer can prove this he cannot escape liability. If he proves that it was partly the fault of the employee plaintiff within the meaning of section 1 of the Law Reform (Contributory Negligence) legislation, this may reduce the damages recoverable but it will not constitute a defence to the action.

(j) Since it is only through other persons that the employer can perform his duty of compliance with the requirements of the regulations it is incumbent upon him to ensure that all of those persons understand those requirements and their practical application to the particular work being undertaken and that they possess the skill, and are provided with the plant, equipment and personnel needed, to secure compliance.

The parties' arguments

[27] Mr Keenan contended that the learned trial judge erred in finding that the acts and omissions of the appellant constituted a complete defence to the

respondent's breach of statutory duty. He contended that the learned judge failed to adequately take into account the nature of the duty imposed upon the employer by Regulation 7(1) and, wrongly, held that such duty could be nullified by the acts and omissions of the appellant. Rather, the learned judge should have found the employer liable for its breach of Regulation 7(1) and found the appellant contributorily negligent on the basis of his acts and omissions and by reason of his breach of Regulation 11.

[28] Counsel also submitted that the principles established in Boyle v Kodak Ltd cannot be satisfied in this case since the acts and omissions of the appellant were not the sole cause of this accident. The employer had an absolute duty to maintain the personal protective equipment entirely independent of the acts and omissions of the appellant.

[29] Mr Spence conceded that the obligation under Regulation 7(1) is absolute and thus the respondent was in breach vicariously of Regulation 7. However in answering the question "Whose fault was it?" he contended that in substance and reality the accident was solely due to the fault of the appellant. The learned trial judge, having heard all the evidence including the engineer on behalf of the plaintiff, found no fault on the part of the respondent which went beyond or was independent of the wrongful act of the appellant. Therefore he was correct to dismiss the plaintiff's case.

Conclusion

[30] On the basis of the factual findings made by the learned trial judge, we are satisfied that this accident occurred because of the omission of the plaintiff to perform duties which were properly and reasonably assigned to him by the employer. He understood the requirements of those duties and the nature of their practical application to the task in hand.

[31] The respondent could not be expected personally to examine every glove on every occasion across every moment of the plaintiff's employment. The trial judge has found that clear and adequate instructions, warnings and advice had been given to him together with appropriate training, monitoring and supervision. Despite the plaintiff calling an engineer, there was no criticism of the system of work or the equipment itself including the gloves and knife. There was no evidence that a system of work in which the plaintiff, inter alia, was responsible for drawing the employer's attention to any defect with the gloves should they become defective, was unacceptable. The system of work therefore, remained uncriticised throughout the hearing.

[32] Critically, the learned trial judge made a factual finding that there was no defect or hole in the glove when the plaintiff commenced to wear it immediately

after lunch. He held that such defect in the glove as occurred in the event happened during the 45 minutes that the plaintiff was using it.

[33] During the ebb and flow of argument in the case, various possible alternative factual scenarios were posited including an analysis of what the situation might have been had the hole been caused by another employee prior to the plaintiff lifting it up in such a defective state or consideration of liability if there had been previous instances where a glove had become defective. Whilst such factual scenarios were of interest in scrutinising the reach of the absolute liability under Regulation 7, they did not reflect the factual findings in this case. The learned trial judge had found that there was nothing to suggest there was anything defective about the glove when the plaintiff first put it on and, as indicated above, there was nothing found to be untoward about the system or procedure under which the employee was obliged to alert the employer to any fault in that glove and cease work until it was remedied i.e that this was a duty reasonably and properly assigned to him.

[34] In our view this case was far removed from the other authorities opened to us where an employee was found to be blameless in circumstances where the employer could have taken no further reasonable step. In the instant case, the clear finding of the judge was that the plaintiff had been aware of the defect in the glove, had been solely responsible for failing to alert his employer to that situation notwithstanding the clear instruction to him to do so and where such a system for compliance was not subject to informed criticism.

[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.

[36] The respondent had taken every practical step to ensure the health and safety of the appellant and the appellant's case in negligence must therefore fail.

[37] Although, in the wake of the breach of Regulation 7, the burden was on the respondent employer to establish that the only act or default of anyone which caused or contributed to the non-compliance was the act or default of the appellant himself, we are satisfied that the learned trial judge correctly concluded that this had been achieved by the respondent.

[38] Accordingly we find no error of fact or principle of law on the part of the learned trial judge. In those circumstances we dismiss the appeal and affirm the decision of the lower court. We shall hear the parties on costs.