Neutral Citation No. [2014] NIQB 100 | *Ref:* **STE9291**

Judgment: approved by the Court for handing down | *Delivered:* **08/08/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

MELVIN FULTON

Plaintiff;

-and-

VION FOOD GROUP LIMITED

Defendant.

_____

STEPHENS J

Introduction

[1] On 10 June 2009 the plaintiff, Melvin Fulton, now 23, then 18 (date of birth: 23 March 1991) sustained an injury to his right index finger whilst in the course of his employment with the defendant Vion Food Group Limited. The defendant operates a meat processing plant at Molesworth Street, Cookstown, Co Tyrone, at which the plaintiff was employed as a factory operative performing butchery work. The plaintiff alleges that he was working on one of the 6 butchery lines in the defendant's boning hall and that his work included placing waste trimmings in one tray and cut meat in another. When a tray was sufficiently full he was required to push it away from him, from one level to another. The plaintiff accepts that he was provided with and was wearing at his waist a scabbard in which to sheaf his boning knife but he chose instead to keep the knife either in his right or left hand as he pushed a tray containing either meat or waste with both hands away from him and slightly to his right. As he pushed the tray his right index finger came into contact with the blade of the knife and he sustained a cut causing nerve and tendon damage. The cut was as a result of the blade being drawn across his finger or his finger moving over the blade. It was described as a slash type cut rather than a penetrative injury from the point of the blade.

[2] The plaintiff brings this action alleging that the defendant, its servants or agents, were guilty of negligence and/or breach of statutory duty. He asserts that:

(b) this was his first day on a main line in the boning hall as opposed to the trainee line and that the line upon which he was working was going faster than the trainee line. That as a result he was put under pressure of time in his attempts to keep up with the pace of work.

(c) there was a general practice in the boning hall of employees pushing trays without having sheaved their knives and accordingly he was doing no more and no less than what was tolerated by the defendant.

(d) there was a hole in the glove that he was wearing which he had reported to a person in authority namely, Mr O'Brien, but that he had been instructed to continue at his work wearing the defective glove. That he continued to work with the defective glove for some 45 minutes and that the part of his index finger that was cut coincided with the location of the hole in the glove.

(e) that as there was a hole in his glove and irrespective as to whether he had reported the defect in his glove to any person in authority on behalf of the defendant that the defendant had failed to comply with Regulation 7 of the Personal Protective Equipment at Work Regulations (Northern Ireland) 1993 ("the 1993 Regulations").

[3] Special damages were agreed in the sum of £381.26. General damages were not agreed. It was suggested on behalf of the plaintiff that an appropriate figure for general damages was £25,000 whilst on behalf of the defendant the suggested figure was £20,000. In so far as it may be relevant I assess general damages at £25,000.

[4] Mr Keenan QC and Mr Parke appeared on behalf of the plaintiff and Mr Spence appeared on behalf of the defendant.

Legal principles in relation to statutory duties

[5] Numerous breaches of statutory duty were alleged by the plaintiff but the case was argued solely by the plaintiff in relation to regulation 7 and by the defendant in relation to regulation 11 of the 1993 Regulations. Those 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."

[6] Mr Keenan submitted, Mr Spence conceded and I hold that regulation 7 of the 1993 Regulations imposes an absolute duty on the defendant. The imperative language in regulation 7 means that the personal protective equipment has to be maintained in an efficient state, in efficient working order and in good repair. The word "maintained" is employed to denote the continuance of an efficient state, efficient working order and a state of good repair. It describes a result to be achieved rather than the means of achieving it. Accordingly if the personal protective equipment is not in an efficient state or in efficient working order or if there is any lack of good repair then there has been a breach of statutory duty even though all reasonable steps have been taken by the employer. The obligation on an employer is to ensure that the personal protective equipment is continually in an efficient state, efficient working order and in a state of good repair. Whether it is in such a state or in good repair is to be assessed in relation to its purpose, namely to perform its health and safety function. See *Galashiels Gas Co Ltd v Millar* [1949] AC 275, [1949] 1 All ER 319, *Stark v Post Office* [2000] All ER (D) 276, *Fytche v Wincanton Logistics plc* [2003] EWCA Civ 874, [2003] ICR 1582 and *Ball v Street* [2005] EWCA Civ 76.

[7] 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

a) that the personal protective equipment was either not in an efficient state or in efficient working order or in good repair and

b) that this failure caused or contributed to the injury.

However a further social purpose of regulation 7 is to place upon 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. There will always be a residual risk that regardless as to the degree of care taken by the employer that the personal protective equipment will not be in an efficient state or in efficient working order or in good repair. The employer rather than the employee assumes that residual risk.

[8] The statutory duty on the employer is not the only statutory duty in this case. There is also a statutory duty on the employee. The employee has an obligation under regulation 11 in relation to personal protective equipment with which he has been provided under regulation 4(1). That obligation comes into existence when there is either loss of or an obvious defect in the personal protective equipment and it is to forthwith report this to his employer. The defect has to be obvious and this is to be contrasted with the employer's absolute duty under regulation 7 which does not depend on the defect being obvious or even on it being discoverable so long as

the defect renders the personal protective equipment not be in an efficient state or in efficient working order or in good repair.

[9] Regulation 7 imposes obligations which can result in compensation of an employee regardless as to any lack of care by the employer, see *Stark v Post Office*. That is not to say that the employee's actions or any lack of care by the employee is irrelevant. The purpose of the 1993 Regulations is not to impose on the employer the entire financial burden of compensating the employee irrespective of what the employee has done. For instance a failure by an employee to comply with regulation 11 is "fault" within the meaning of section 2 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948 which may reduce the damages recoverable. Negligence on behalf of the employee is also "fault" within the meaning of section 2 which may also reduce the damages recoverable. The actions of the employee are also relevant because in addition and in very limited circumstances those actions may amount to a complete defence even if the employer is in breach of regulation 7, see *Boyle v Kodak Limited* [1969] 2 All ER 439. It is "open to the employer to set up a defence" to the breach of regulation 7 "that in fact the employer was not in any way at fault but that the plaintiff employee was alone to blame." It would be incongruous and irrational if the employee could be the sole reason why the employer is in breach of regulation 7 and yet be entitled to damages as a result of being solely responsible for that breach. "To say "You are liable to me for my own wrongdoing" is neither good morals nor good law." A finding that an employee is alone to blame is a defence to a plaintiff's claim for breach of statutory duty. It is not a finding of 100% contributory negligence. However once a breach of regulation 7 has been established and that breach caused or contributed to the injury then the burden is on the employer to establish that *in substance and in reality* the accident was *solely* due to the fault of the plaintiff, so that he was the *sole* author of his own wrong. Lord Diplock stated that "… if the employer 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."

The factual background

[10] I include in this description of the factual background my findings in relation to any conflicts of evidence. In assessing the credibility of the witnesses I seek to apply the factors set out by Gillen J at paragraphs 12 – 13 of his judgment in *Thornton v Northern Ireland Housing Executive* [2010] NIQB 4. The plaintiff presented in court as intelligent but I found him to be an unimpressive witness. In relation to any conflict of evidence between the plaintiff and any of the defendant's witnesses I prefer the evidence of the defendant's witnesses.

[11] There were 6 lines and approximately 90 employees in the boning hall. There are approximately between 9 and 10 or up to 15 to 20 employees on each line. Each employee has a specific task using a knife in relation to the particular meat which is being processed on that line. Each employee performs his task and the meat then passes to the next employee in order for the next task to be performed. The lines

consist of long tables which incorporate conveyor belts. The conveyor belts perform the function of moving the meat being processed along the length of the table. The meat as it moves along the table is not in any tray and it is cut and processed on the table. On the far side of the table from the employees and slightly higher than the table there are trays angled towards them. These trays are available so that the cuts of meat are placed in different trays from waste such as fat. When a tray is full, whether of waste or of meat, the employee then pushes the tray further away from the table and upwards onto another conveyor which takes the tray away. That conveyor forms what I will term "the top part of each line." Empty and clean trays are then available from the position in which they are stored below the table.

[12] Each of the lines was supervised by a team leader whose job it was to move up and down the line. The team leader was not himself engaged in doing any physical work. The team leader's 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 subject to the check was in good order.

[13] All the employees in the boning hall, including the plaintiff, had their own personal knife which was inscribed with their name and number so that they could identify it.

[14] All the employees in the boning hall, including the plaintiff, were issued with personal protective equipment. The plaintiff was shown the proper use of the personal protective equipment when it was issued to him by Mr O'Brien. The only variation in the personal protective equipment issued to employees depended on whether the employee was right or left handed. The plaintiff, being right handed, 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 being attached to a chain link belt. The Kevlar glove is designed to afford protection from a slash type cut but it would not protect against a penetrative injury from the point of the blade of the knife. Mr McKeown, the plaintiff's engineer stated that the Kevlar glove "should be effective, it should prevent a slash" but it will not "protect a puncture with the point of the knife." That evidence was not challenged.

[15] The gloves, that is the chain mail glove for the non-dominant hand and the Kevlar glove for the dominant hand, were issued to all 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 defendant. 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 and 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 defendant. 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. I find that if a defect in a glove was reported to a person in authority then a replacement glove was provided to the employee within one or two minutes. I also find that no employee was required to work with a defective glove whilst a replacement glove was being obtained but rather such an employee was required not to work and to stay off the line until a replacement glove was obtained.

[16] At the end of each period of work during the day, for instance before a coffee/tea break or before 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 they 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 any defect reported to a person in authority on behalf of the defendant.

[17] At the end of the day the gloves were put into the tray. The gloves inevitably become progressively dirty during the day through exposure to meat and blood. Accordingly overnight and upstairs they were washed in a washing machine and dried in a tumble drier by the defendant.

[18] The next morning the cycle in relation to the gloves would start again.

[19] There was no evidence that this system in relation to gloves was ineffective. There was no evidence of defective gloves being worn or of injuries being sustained as a result. Rather the evidence was that this system worked in practice. Indeed the evidence of the consulting engineer called on behalf of the plaintiff was that the system was appropriate. That is not to say that there could not be a different system but I find, on the basis of the evidence presented to me, that this system was both reasonable and effective.

[20] Approximately 5 months before his accident and on 27 January 2009 the plaintiff commenced employment with the defendant. On that date he attended an induction course and that course included the topic of health and safety. I find that considerable emphasis was placed by the defendant on health and safety during that course and that particular emphasis was placed on the risks posed by the use of knives. The plaintiff was told to always replace his knife in the scabbard when not in use. He was also told 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. That the personal protective equipment must be worn at all times when using knives. I consider that the induction course was not just some formulaic description of risks given with a degree of indifference but rather that it was a serious and sincere course emphasising to those in attendance the health and safety risks and the precautions that should be taken. That the induction course covered not only the use of knives but also for instance lifting, keeping the workplace tidy and safe, making sure that the floors were clean and the risks of

slipping accidents. That the employee's responsibilities were also covered in the induction course including the obligation immediately to report defects in protective clothing.

[21] I find that as a result of the plaintiff's attendance on the induction course that he knew that the knife that he was going to be using was extremely sharp and that it presented risks to him and to other employees. I also find that he knew that his knife should always be sheaved in the scabbard that was provided to him when it was not being used to cut meat. I also find that the plaintiff was completely aware of the risks to himself and to others if for instance it was not sheaved in the scabbard. The induction course also informed the plaintiff that he was to check his personal protective equipment on each occasion before he put it on and also to check it 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. That he understood that if there was any defect in his equipment he was not to work until the defective equipment had been replaced.

[22] After the induction course the plaintiff moved to the boning hall. On the first day in the boning hall he had the health and safety contents of the induction course repeated to him before he started work.

[23] The plaintiff knew as a result of the induction course and his experience working at the defendant's premises that working with a glove with a hole in it was dangerous, that as soon as he was aware of the hole he should stop working, step away from the line and report the defect.

[24] The plaintiff's evidence was that when he commenced work in the boning hall he was placed on a trainee line and that he thought that usually a trainee is kept on the training line for 6 months before moving to a main line. He stated that at the start of the day of the accident he was taken off the training line after having been on it for approximately 5 months and that he was placed on a main line. He assumed that the reason for going on to a main line was that there was an absentee but he was not told that and he was not given any reason. I reject the plaintiff's evidence that there was a dedicated training line and prefer the evidence of Mr O'Brien that new starts could fill in on any line and that there is no designated training line. I also accept the evidence of Mr O'Brien that the plaintiff commenced work in the boning hall on Mr O'Brien's line and that he was moved from Mr O'Brien's line to line 4 after lunch. That the work that he was doing on both lines was trimming and that he had experience of this work.

[25] The plaintiff 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 plaintiff's evidence was an assertion that the speed was greater on the particular line on which he was working but he did not attribute this to a particular feature such as the speed of the conveyor belt or the

amount of meat being placed on the line or the amount of time that was required to deal with a particular cut of meat. I find that the conveyors on each line operate at the same speed. However the speed of work is also a function of the amount of meat that is placed on the conveyor on each line and the amount of time that is required to deal with the particular cuts of meat on each line. I accept the defendant's evidence that the product for each line is always placed at the same intervals on the conveyor belt but that would not rule out some variations in the speed of a line depending on the nature of the product and the work that had to be done on it. In general terms the defendant's evidence was that there was no marked difference between the speed of the lines and Mr O'Brien's evidence was that the plaintiff's line was if anything slower than the line on which he had previously worked. I do not consider that the plaintiff has established any appreciable difference in speed between the line on which he had previously worked and the line on which he was working on the day of the accident. I do not consider that the plaintiff has established that he was under any pressure of time.

[26] The plaintiff states that he had been off on his lunch break along with the other employees on his line. That he placed his gloves in the tray at the start of the break and that upon his return after the break he took both a chainmail and a Kevlar glove from the tray. That these gloves were the last ones in the tray. He stated that upon inspecting the Kevlar glove he found a substantial hole in the right index finger. He stated that the hole was bigger than a 5 pence piece but smaller than a 20 pence piece. If there was a hole in the glove then the employee who had previously worn the glove should not have put it in the tray but should have reported the defect to a person in authority on behalf of the defendant. The plaintiff states that having inspected the glove he reported the defect to Mr O'Brien but was told to work on. That he did as he was told without any protest and without asking for an explanation despite knowing that this was a breach of safety instructions. Accordingly that he went to work on his line with a defect in his glove. That upon his return to his line he could have, but did not, report the defect in the glove to the team leader for his line, Mr Dinsmore. These proceedings commenced on 30 March 2012. The Statement of Claim was served on 13 November 2012. An amended Statement of Claim was served on 30 April 2014. It was only on 15 May 2014 that in an "amended amended" Statement of Claim that it was alleged that the plaintiff had reported the defect in his glove before the accident had occurred. This case was never made at an earlier stage for instance during the investigation into the cause of the accident or during the plaintiff's employment disciplinary proceedings. I reject the plaintiff's evidence that he reported the defect in his glove to Mr O'Brien. I accept the evidence of Mr O'Brien that the plaintiff did not make any such report to him. I accept that the plaintiff inspected his Kevlar glove before he put it on. I reject his evidence that there was a hole in the glove at that stage. I consider that on inspection at that time there was nothing to indicate that the glove was then defective. Accordingly even if it had been inspected by a person in authority on behalf of the defendant it would have passed that inspection.

[27] I find that a hole developed in the plaintiff's Kevlar glove at some stage during the 45 minutes after he returned to work from his lunch break. That the hole had developed before the plaintiff sustained his injury rather than being caused in the accident itself. I find that the plaintiff 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.

I also consider that given the timescales involved and the nature of the work that there was no opportunity for anyone on behalf of the defendant to have become aware of the existence of the hole in the plaintiff's glove.

[28] The plaintiff's evidence was that some 45 minutes after the lunch break and 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 couldn't remember what hand his knife was in. That the accident all happened so fast at the time and that all that he knew was that as he pushed the tray with both hands the next thing he knew was that his hand was bleeding. If the knife was in his right hand then he must have lost his grip on the handle of the knife and his finger must have slid up the blade so that he sustained the cut in that fashion. I find that the plaintiff's description as to how the accident occurred was unsatisfactory. On balance I consider that the most likely explanation is that he was holding the knife in his right hand and using the point of the knife rather than using his hand to push the tray. That the weight of the tray was such that he lost his grip on the handle of the knife, his finger then slid up the knife and came into contact with the blade.

[29] The plaintiff provided two explanations as to why he did not return his knife to his scabbard before pushing the tray namely:-

(a) His failure to do so was in response to the time pressure which he was under on the main line. That he had no time to put his knife into the scabbard and then to retrieve it from the scabbard.

(b) It was standard practice for other employees not to return their knives to their scabbards when pushing a tray onto the top part of the line.

I reject both explanations. I have already found that the plaintiff was under no more pressure of time on this line than on any other line. I also consider that it would have taken a second to have put the knife into his scabbard. I accept Mr O'Brien's evidence that there is no practice of other employees not returning their knives to their scabbards. I accept the evidence of Mr O'Neill who had started work at this location at the age of 16 that there was no practice of other employees not returning their knives to their scabbards before pushing a tray onto the top part of the line. I

also accept the evidence of Mr Wilson which was also that there was no such practice.

Discussion

[30] If the glove had a hole in it whenever it had been left in the tray by another employee then the employer would be vicariously liable for that employee's negligence and, given that the defect was obvious, that employee's breach of statutory duty under regulation 11 in failing to report the defect. Furthermore the employer would be vicariously liable for that employee's breach of statutory duty under regulation 7. I have found as a fact that there was no hole in the glove at that stage and this case made by the plaintiff fails.

[31] The only evidence that there was a hole in the plaintiff's Kevlar glove at any time before the accident came from the plaintiff himself. I had concerns as to whether the existence of the hole in the glove prior to the accident was an invention by the plaintiff to explain why he sustained an injury despite wearing a glove. I consider that a Kevlar glove "should" protect against a slashing type cut but I do not consider that it protects against all such cuts. However it was not suggested to the plaintiff's engineer that the accident itself could have caused the hole in the glove. Accordingly, as I have stated and on the balance of probabilities, I consider that the plaintiff has established that there was a hole in the Kevlar glove which occurred at some stage during the 45 minutes after he returned to work from his lunch break and before the accident. This means that the glove was not maintained in an efficient state, in efficient working order and in good repair and that the defendant was in breach of its statutory duty under regulation 7. My factual findings also mean that the plaintiff was in breach of statutory duty under regulation 11.

[32] The whole atmosphere of the defendant's operation involved an emphasis on the health and safety of its employees. I am satisfied that the defendant takes seriously, and in relation to the plaintiff, took seriously the risks presented by amongst other matters the use of knives and the precaution of at all times wearing appropriate gloves. The plaintiff was given clear and adequate instructions. There were adequate systems and supervision in place which included adequate arrangements to facilitate reporting of defects in personal protective equipment and the replacement of such equipment. In so far as the plaintiff makes a case in negligence against the defendant I reject that case. The defendant took every practical step for the health and safety of the plaintiff.

[33] As I have indicated the plaintiff has established that there was a breach by the defendant of its statutory duty under regulation 7. The burden is then on the defendant 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 plaintiff himself. I consider that the defendant has discharged that burden. I will not repeat all the factual findings that I have made. They are all relevant to this conclusion. I repeat

that the only person who knew of or who could have known of this obvious defect was the plaintiff. He did nothing about it.

Conclusion

[34] I dismiss the plaintiff's claim and enter judgment for the defendant.

[35] I will hear counsel in relation to costs.