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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between

DIANE VICTORIA HERRON

Plaintiff:

-and-

DALE ROBERTS
and
PATRICK MURDOCK

Defendants:

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STEPHENS J

Introduction

[1] The plaintiff, Diane Victoria Herron, sustained multiple serious injuries on 30 July 2013 when, as she was walking on the pavement at Irish Street, Downpatrick, she was struck by a Leyland Daf 7.5 ton horse lorry ("the lorry") which was owned by the first defendant, Dale Roberts and which had been worked on by a mechanic, the second defendant, Patrick Murdock. The lorry whilst being driven by the first defendant down the steep incline on Irish Street had broken down as a consequence of running out of diesel after which the first defendant was unable to move it to the side of the road. The front of the lorry remained pointing downhill on its correct side of the road causing disruption to traffic. The first defendant then obtained the assistance of the second defendant in order to carry out repairs to the lorry. After it had been worked on by him, but at a time when no one was in the cab of the lorry, it suddenly took off at speed and without anyone in control, down the hill mounting the footpath, striking the plaintiff and also causing damage to a number of properties. It transpired that the lorry had been held stationary by its automatic emergency braking system and that the ordinary hand brake had not been engaged. The work which the second defendant had undertaken, including starting the engine

and running it for a period of approximately 1 minute and 40 seconds meant that the automatic emergency braking system had released so that there was nothing to stop the lorry from careering off down Irish Street.

[2] On 21 March 2017 Mr Brian Fee QC, who appeared with Michael Boyd for the plaintiff, opened the case in relation to liability. At that stage I suggested, and it was agreed, that as the only liability issues were between the defendants it was appropriate to determine liability as between the defendants with the potential to make an interim award of damages to the plaintiff if there was any delay in relisting the case for final assessment of damages. In that way settlement of the final amount of the plaintiff's damages would be facilitated as it would be known whether one or other or both of the defendants were obliged to compensate the plaintiff. The action in relation to liability then proceeded on the basis that both of the defendants agreed that one or other or both of them were liable to the plaintiff. The plaintiff's legal representatives did not attend the liability hearing as the plaintiff could give no evidence as to how control of the lorry was lost. It was formally accepted by the defendants that she was struck in the way described in Mr Fee's opening. Mr McCollum QC, who appeared with Mr Cartmill on behalf of the first defendant, opened the first defendant's case. Mr Simpson QC, who appeared with Ms McKenna, opened the second defendant's case. Evidence was then called on behalf of both of the defendants.

Legal framework

[3] It is accepted that one or other or both of the defendants is liable to the plaintiff.

[4] The first question to be considered individually in relation to each defendant is whether they were guilty of negligence.

[5] In considering that question the first defendant has pleaded that the actions of the second defendant amount to a *novus actus interveniens* so as to relieve~~f~~ the first defendant of all liability. The law in relation to *novus actus interveniens* is considered in Clerk & Lindsell on Torts, 21st edition at paragraph 2-107 where it is stated that

> "No precise or consistent test can be offered to define when the intervening conduct of a third party will constitute a *novus actus interveniens* sufficient to relieve the defendant of liability for his original wrongdoing. The question of the effect of a novus actus "can only be answered on a consideration of all the circumstances and, in particular, the quality of that later act or event"."

One issue which needs to be addressed in considering all the circumstances is whether the intervening conduct of the second defendant is such as to render the original wrongdoing merely a part of the history of events. The intervening conduct

relied on by Mr McCollum was that at the crucial time the lorry was under the sole control of the second defendant, the experienced mechanic, so that, to the exclusion of the first defendant, the second defendant was entirely liable to the plaintiff. I consider that there could be factual situations where the mechanic would be in sole control and entirely liable but whether that is so depends on an analysis of each case. Even if it is established that a mechanic does take control that does not necessarily relieve the driver of the obligation to volunteer information to the mechanic, to supply information which is requested by the mechanic or to be aware of potential ambiguities in the questions that are asked of him and in the answers which he gives. Furthermore, the driver might be liable for any negligence on his part in the handover of control from him to the mechanic or in failing to leave the lorry in as secure a condition as possible. For instance a failure to secure the lorry on a steep incline in a built up area with other traffic and pedestrians in the vicinity, who were at risk of death or serious personal injury if control of the lorry was lost may not amount to merely a part of the "history of events."

[6] One matter which is merely a part of the history of events is the negligence of the first defendant in permitting the lorry to run out of diesel resulting in it stopping in a dangerous position. Mr Simpson on behalf of the second defendant did not seek to establish that this negligence on the part of the first defendant in causing the lorry to run out of diesel was an operating cause of the plaintiff's injuries but rather conceded that it was too remote, being only the event that led to the dangerous situation developing.

[7] If both defendants are found guilty of negligence then the second question is as to the appropriate apportionment between them. Section 2(1) of the Civil Liability (Contribution) Act 1978 provides that the amount of the contribution recoverable from any person "shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question". The proper basis of apportionment was considered in *Downs v Chappell* [1997] 1 W.L.R. 426. Hobhouse L.J. stated that: "[i]t is just and equitable to take into account both the seriousness of the respective parties' faults and their causative relevance. A more serious fault having less causative impact on the plaintiff's damage may represent an equivalent responsibility to a less serious fault which had a greater causative impact." Another example of the comparison of fault and causative relevance would be where the causative potency of both parties' acts is equal, but the moral blameworthiness of one party's conduct is significantly greater than that of the other. In such a case an equal division of the damages would be inappropriate.

Factual background

[8] The first defendant, a trainer and teacher of equestrian sports, had purchased the lorry second hand in approximately 2007. He stated that upon purchasing it he just "got in and turned the key" making no attempt to consider whether there was an owner's instruction manual in the glove compartment or if there was, to read it.

[9] On an annual basis the lorry required to undergo a Public Vehicle Service (PSV) test. In advance of and to prepare the lorry for the test in 2013 the first defendant left the lorry with Dermot Flanagan, a mechanic. After it had been returned to him the first defendant took the lorry to the test centre in Downpatrick but it failed the test on a number of grounds including that there was front brake imbalance.

[10] The first defendant returned the lorry to Mr Flanagan, who without informing the first defendant, had the necessary work to the lorry carried out by the second defendant.

[11] On 30 July 2013 the first defendant again took the lorry to the PSV centre in Downpatrick and on this occasion it passed the test.

[12] The first defendant was driving away from the test centre along a route which involved going down Irish Street when the lorry ran out of diesel. The first indication that there was a problem with the lorry occurred when it was just higher up Irish Street than the old police station. The engine stopped and the first defendant was able to restart it by turning the ignition key. He then drove on down the hill but the engine cut out again. On this occasion he could not restart it by turning the ignition key. He states that the steering wheel was turned slightly so that the vehicle was pointing towards the nearside and that after the lorry had stopped on this second occasion the steering wheel could not be moved. Furthermore that the brake pedal, the clutch pedal and the accelerator pedal were all locked.

[13] The lorry was causing an obstruction to traffic and the first defendant attempted to free wheel it. If the first defendant had engaged the handbrake/parking brake after the lorry had come to a stop then in order to free wheel it he would have to disengage that brake. He could do so by a handle just to the left of the driver's seat. There is no sign on the parking brake to indicate in which direction of the handle the brake is on or is off. However I find as a fact that if the handle is away from the gear lever the parking brake is on. I also find as a fact that the first defendant moved the parking brake handle on a number of occasions before the second defendant arrived at the scene and that moving the handle in that way released air from the air assisted hydro braking system and caused the automatic braking system to engage on both rear wheels. That automatic braking system would automatically unengage when the air in both tanks built up again to five bars. I find as a fact that when the air pressure in the braking system fell below five bars and the ignition was on that an alarm buzzer sounded in the cab. I find that after the engine cut out for the second time the first defendant had the ignition on at a time when the air in the braking system had fallen sufficiently so that the buzzer sounded and that he heard it sounding.

[14] The first defendant had to wait in the cab of the lorry for a considerable period of time, at least one to one and a half hours, before the second defendant arrived on the scene. The first defendant had telephoned Mr Flanagan and he in turn had contacted the second defendant who was doing his own normal service work in his own premises. The second defendant was annoyed at being called out in this way and wanted to get the job in relation to the lorry done as quickly as possible. He knew that the lorry was on the hill in Irish Street. He went to the scene in his van which co-incidentally contained wheel chocks which in the event he did not deploy.

[15] The second defendant had been told by Mr Flanagan that the lorry was out of diesel. The second defendant had also been told by Mr Flanagan that the first defendant had been churning at the vehicle by which he meant repetitively turning the ignition key in an attempt to start the engine and this had caused the battery to be flat. A diesel engine such as this requires a 24 volt booster pack in order for it to be jump started. The second defendant brought to the scene such a booster pack together with five gallons of diesel. He had also been told that the lorry had passed its PSV test. I find as a fact that during the PSV test on 30 July 2013 all the brakes on the lorry had been tested and that the second defendant was justified in understanding that the parking brake, if engaged, was in order.

[16] There was a conflict of evidence as to what occurred when the second defendant arrived at the scene. The second defendant states that he parked his van on the opposite side of the road to the lorry and that the first defendant remained in the cab of the lorry. The second defendant states that he then crossed the road and spoke to the first defendant whilst the first defendant remained in the cab. He stated that he asked the first defendant "Is the brakes on" and that the first defendant replied "yes". He then asked him whether he would get out of the cab and held the diesel funnel for him and that the first defendant did get out of the cab and did hold the diesel funnel. The first defendant states that a conversation took place when he was outside the cab and could not recall being asked by the second defendant "is the brakes on". I consider that the police interview of the second defendant establishes that it is more likely that the conversation did occur when the first defendant was out of the cab. However, on balance I accept the evidence of the second defendant that he asked the question "Is the brakes on" and that he was told "yes" by the first defendant.

[17] The first defendant did not tell the second defendant that the buzzer had sounded or that he had moved the parking brake on and off on a number of occasions or that he had attempted to depress the brake pedal. The second defendant did not make any other enquiry of the first defendant apart from asking "Is the brakes on," by which enquiry he meant the parking brake though he did not use the words "Is the parking brake/handbrake on." The first defendant could have but did not enquire as to which brake was meant by the question "Is the brakes on." I find as a fact that the second defendant meant the handbrake and that the first defendant understood that the enquiry included a reference to the handbrake. I also

find as a fact that upon the second defendant's arrival at the scene he took control of all the various tasks that were to be undertaken and the sequence in which they were to be performed. However, the first defendant remained at the scene throughout in close proximity to the second defendant and had the opportunity to speak to him on a number of occasions and to inform him as to for instance the buzzer having sounded in the cab of the lorry.

[18] It is not clear on the evidence as to whether and if so when and by whom the driver's door of the cab was closed. The significance of this is that a simple glance into the cab with the door open would have revealed that the parking brake was off and this remained the position even when the cab was tilted forward to enable the second defendant to work at the engine. It is clear that the driver's door had to be open to enable the second defendant to turn over the engine with the ignition key in order to bleed air out of the diesel fuel supply pipes. The door also had to be open when the second defendant started the engine having bled the air out of the system. The engine would have been running at that time for approximately 1 minute 40 seconds before the lorry careered off down Irish Street. The question remains whether the door was open throughout or whether, for instance, the first defendant closed it on getting out of the cab. I do not consider that it is necessary to resolve that factual question as it is quite apparent that when the cab door was open it was possible with a simple glance for either of the defendants to have seen that the parking brake was off and this remained the position if the cab was tilted forwards. Furthermore, even if the cab door was closed by the first defendant, the second defendant could and should have opened the door to check the position of the parking brake.

[19] The sequence of events after the initial conversation was that diesel was put into the tank on the driver's side of the lorry by the second defendant with the assistance of the first defendant. The second defendant then went around the front of the lorry to the nearside and tilted the cab forward to gain access to the engine and to bleed the diesel supply pipe. This involved loosening the screw of a bleed nipple and manually moving an adjacent lever until there was a clear flow of diesel to that point. The screw was then tightened and the second defendant moved around the front of the lorry to the driver's side. He checked that the lorry was in neutral. He opened up 2 or 3 injectors and with the door of the cab open turned the ignition key so that the engine turned over and released air and allowed a clean flow of diesel to that point in the system. He tightened up the injectors and then attached the booster pack to the batteries. Again with the cab tilted, the door of the cab open and standing outside he used the ignition key to start the engine. He also used the accelerator pedal by depressing it with his hand to keep the engine going. He checked to make sure that there was no diesel leaking out of the injectors. Having run the engine for about 1 minute and 40 seconds and having been satisfied that there was no leak he was then going to move around the front of the lorry to let the cab back down into its ordinary position. In fact what was occurring as a consequence of the engine running was that the air in the two tanks was building back up to five bars. This meant that the steering wheel returned to normal, the foot

brake system returned to normal and crucially the emergency brakes released. The lorry then ran down the hill with no one at the controls and struck the plaintiff.

[20] In his evidence the second defendant stated that when he arrived at the scene he thought that the brakes were working in "some shape or form" as the lorry was stationary. He accepted that he could have found out whether the emergency braking system had engaged by enquiring of the first defendant as to whether he had pumped the brake pedal or moved the parking brake handle back and forward repetitively. The second defendant accepted that he should have checked that the parking brake was on.

The first question in relation to each defendant is as to whether they were guilty of negligence

[21] I consider that both defendants were guilty of negligence causing or contributing to the plaintiff's injuries. I do not consider that the intervening conduct of the second defendant constitutes a *novus actus interveniens* but rather that the negligence of the first defendant continued after the intervention of the second defendant and that the prior negligence of the first defendant, in for instance not engaging the parking brake, not checking that the parking brake was engaged and in not informing the second defendant that the parking brake was not engaged were all operating causes rather than a part of the history of events.

[22] I will consider the liability of each defendant in turn commencing with the second defendant.

The second defendant's negligence

[23] The second defendant was an experienced mechanic who was aware of the braking system on the lorry including the emergency braking system not only through his previous general experience but also because he had recently worked on it. He knew about the significance of the driver having repetitively moved the parking brake and having pumped the brake pedal. The second defendant ought to have, but failed to make any enquiry of the first defendant in relation to the movement of the parking brake or brake pedal. If he had done so he would have known that there was no air in air assisted hydro braking system with the potential that the only braking system engaged was the automatic braking system.

[24] The second defendant's single enquiry to the first defendant was both cursory and ambiguous. He ought to have but failed to ask the simple question "Is the parking brake on?"

[25] The second defendant knew that there was a buzzer in the cab and he ought to have but failed to make an enquiry of the first defendant as to whether it had sounded.

[26] I consider that upon seeing the lorry the second defendant made a casual assumption that it was adequately secured without making any attempt to analyse the situation or to consider the safety of others as he ought to have done before commencing to work on the lorry. He was in a rush and annoyed at being called out and this prevented a proper and appropriate analysis by him.

[27] The second defendant given the highly dangerous position of this lorry and the risks that it posed to the lives of others ought to have, but failed to, use the wheel chocks, which at all times remained in his van just yards away. The magnitude of the risk was such that even if the parking brake had been engaged the chocks ought to have been used. If he had used the wheel chocks then they would have prevented the lorry running out of control down the hill.

[28] The second defendant knew of the potential for the air tanks to have been depleted from his experience and from the fact that he had been told that the first defendant had churned the ignition. It could and should have been anticipated by the second defendant that a person who had churned the ignition may well also have moved the parking brake handle and pumped the brake pedals.

[29] The second defendant should and could have checked that the parking brake was on. This would have involved a simple glance into the cab of the lorry. He failed to do so.

[30] The second defendant should not have started the engine without a driver being in the cab behind the steering wheel. The Health and Safety Executive publication entitled "Health and Safety in Motor Vehicle Repair and Associated Industries" state at paragraph 187:

> "Engines should only be started by someone sitting in the driver's seat with their legs in the vehicle, with the handbrake on the vehicle in neutral. Failing to follow this procedure, for example operating the start of motor from outside the vehicle, has resulted in fatal injuries due to the vehicle falling from a lift, running over a worker beneath it or crushing someone as an open door passes a support pillar, adjacent vehicle, or other fixed object."

This advice is nothing more than what would be reasonably apparent to a mechanic faced with the breakdown of this lorry in Irish Street. If it had been followed the accident would not have occurred as the person in the cab could have operated the foot brake or the parking brake or could have steered the lorry.

The first defendant's negligence

[31] The first defendant did not nor has it been established that he ought to have had the same level of knowledge as the second defendant.

[32] The first defendant knew that the buzzer had sounded in the cab. He ought to have but made no attempt to find out what it meant either by searching for and looking in the owner's instruction manual or by enquiring of Mr Flanagan to whom he spoke by telephone or by enquiring of the second defendant when he attended at the scene. He ought to have but failed to bring to the attention of the second defendant that the buzzer had sounded. I find as a fact that if the second defendant had been told that the buzzer had sounded then he would have known that the air pressure had failed and that the lorry might be held in this dangerous position on a steep hill only because it was restrained by the emergency braking system, rather than by the parking brake. I find that this would have led the second defendant to check that the parking brake was on and also to check the amount of air in the two tanks by turning on the ignition and reading the relevant dial on the dashboard. That if he had checked the parking brake he would have found that it was not engaged. He would then have engaged it and this would have prevented the lorry running out of control down the hill.

[33] The first defendant ought to have applied the parking brake leaving the lorry as secure as possible.

[34] The first defendant having failed to engage the parking brake ought to have told the second defendant that he had failed to do so rather than answer "yes" to an enquiry "Is the brakes on?"

[35] The first defendant had a continuing opportunity to check the position of the parking brake whilst the lorry was being worked on by the second defendant and he failed to check. If he had done so the parking brake would have been engaged and this would have prevented the lorry running out of control down the hill.

The second question in relation to apportionment

[36] There is a significant difference in expertise between the defendants. The second defendant is an experienced mechanic and when he arrived at the scene he took control. As I have indicated this did not relieve the first defendant of liability. I consider that the operating causes of the loss of control of the lorry are fairly evenly balanced but that the fault on the part of the second defendant is far more serious than that of the first defendant. I apportion liability 25% to the first defendant and 75% to the second.

Conclusion

[37] The plaintiff is entitled to judgment against both defendants for damages to be assessed.

[38] I will apportion the damages between the defendants on the basis of 25% to the first defendant and 75% to the second.

[39] I will proceed to make an interim award of damages and fix a date for the final assessment of damages.