Neutral Citation No. [2010] NIQB 94 | *Ref:* **HAR7908**

Judgment: approved by the Court for handing down | *Delivered:* **6/9/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

STEPHEN HYNDMAN

Plaintiff;

-and-

WILLIAM BROWN
and
COLIN BRADLEY LIMITED

Defendants.

_____

HART J

[1] The plaintiff was born on 15 October 1982 and is now 28, he was 20 when he was injured whilst harvesting potatoes in Cumbria on 3 September 2003. At the time he was a seasonal worker with William Brown, the first defendant, to whom I shall simply refer as Mr Brown. Mr Brown was an agricultural contractor from Magherafelt who employed 15 employees at the time, both full time and part-time. He had employees working in the Republic of Ireland, Northern Ireland, and the group of men who were working with Mr Hyndman at the time he was injured.

[2] Mr Hyndman's injury occurred while potatoes were being harvested at a field in the vicinity of Winton Hill, Aikbank, Calthwaite, Cumbria. These fields had been rented by Colin Bradley Limited, a company controlled by Colin Bradley, and for convenience I shall refer to the second defendant as Mr Bradley. Mr Bradley grew potatoes on a very large scale around Blackpool, in Cumbria and in the adjoining area of the Scottish borders. In 2003 Mr Brown entered into an agreement with Mr Bradley to harvest potatoes for him, and it is a sign of the scale of Mr Bradley's operations that Mr Brown's contract with him required Mr Brown to harvest potatoes from some 650-700 acres.

[3] At the time of the accident Mr Hyndman was one of Mr Brown's employees who were using machinery to harvest potatoes. Mr Hyndman's job was to drive a tractor and trailer beside a self-propelled mechanical potato harvester which was also provided by Mr Brown as part of his contract. The self-propelled harvester had broken down, and on the day of the accident Mr Hyndman was driving his tractor and trailer alongside a mechanical harvester which was being towed by another tractor. Both the tractor and the harvester belonged to Mr Bradley. Unlike Mr Brown's self-propelled harvester Mr Bradley's harvester drew its power from the tractor engine by means of a Power Take Off (PTO). As the potatoes were lifted from the ground by the harvester they were then mechanically loaded on to the trailer drawn by Mr Hyndman's tractor, and when the trailer was full Mr Hyndman's task was to drive each load to mechanical grading machines which were positioned at a central point in the group of fields of 100 acres or so where the men were working that day.

[4] The field being harvested was stony; the harvester had become blocked with stones on several occasions that afternoon, and each time the harvesting had to stop to allow the stones to be cleared from the machine. The tractor drawing the harvester was being driven by another of Mr Brown's employees, Pat McVeigh. In addition to Mr Hyndman and Mr McVeigh, Jason Robley, a local man, was also working with them. Mr Robley had been employed by Mr Brown one or two days before.

[5] Mr Hyndman's evidence was that each time a blockage occurred Mr McVeigh would try to dislodge the blockage by flicking the PTO on and off. If that did not clear the blockage, someone had to get on to the machine after the PTO had been disengaged, remove the guards over the moving parts and try to loosen the offending item. That person would then replace the guards, dismount, or at least move away from the danger zone, then signal to Mr McVeigh by giving a "thumbs up" sign, whereupon Mr McVeigh would re-engage the PTO. Throughout the entire manoeuvre the tractor engine was not turned off but was idling.

[6] Mr Hyndman, who accepted that he got onto the harvester to clear a blockage at least once before earlier that day, was trying to dislodge the obstruction between the rollers when the harvester suddenly started up, his trousers were caught in the machinery and his foot was drawn into the machinery.

[7] Mr Hyndman denies that he tried to kick the obstruction out of the way in order to clear it, but the nature of the accident in itself appears more consistent with his being engaged in kicking the stone rather than, as he claims, using a spade to clear the obstruction. Dr Mairs, the engineer called on behalf of Mr Hyndman, recognised that the plaintiff's injury could have come about as the plaintiff asserts or because he was kicking at the

obstruction. Mr Hyndman's description of how he was trying to clear the obstruction was at variance with that of Jason Robley.

[8] I take into account that Mr Robley's evidence may be thought to be suspect because he has built up his own agricultural contracting business since these events, and Mr Bradley is one of his biggest customers, although he was not called by Mr Bradley but was called on behalf of Mr Brown. I consider Mr Robley gave his evidence in a very frank and impressive fashion, and I accept that he is a reliable and truthful witness about the events of that day.

[9] Mr Robley trained at an agricultural college some 5-6 years before these events, where he had received some health and safety training. He described Mr Hyndman's actions as not at all safe because the PTO was being turned on and off as Mr Hyndman was in position on top of the machinery, and he said that he just could not believe what Mr Hyndman was doing. He was 4 or 5 years older than Mr Hyndman, and more experienced, and one might wonder why he did not remonstrate with Mr Hyndman at the time. He had only been working for Mr Brown for a couple of days and clearly wanted to establish himself in that employment, and I can understand why he did not point out to Mr Hyndman the danger of what Mr Hyndman was doing.

[10] I accept Mr Robley's description that Mr Hyndman was "heeling" with his foot to make a hole for the spade to be used to remove the stones, and that Mr Hyndman's foot was drawn into the machinery because his foot was too far forward when the machinery went into action. I also accept, as Mr Robley's evidence suggests and was confirmed by the evidence of Dr Mairs, that the engine should have been turned off, and not left to idle, before Mr Hyndman tried to remove the obstruction. This precaution is well known as the "safe stop" procedure. I am satisfied that Mr Hyndman was injured because Mr McVeigh did not take proper steps to satisfy himself that what Mr Hyndman was doing was safe, and Mr McVeigh operated the control to flick the PTO on and off to try to clear the obstruction without ensuring that Mr Hyndman had dismounted from the harvester.

[11] Mr Robley's conclusion why an intelligent and capable employee such as Mr McVeigh engaged the PTO whilst Mr Hyndman was trying to kick the stone away from the rollers where it was causing a blockage was because on the afternoon in question the sun was setting behind the harvester, Mr Hyndman was in the sun so far as Mr McVeigh was concerned and Mr McVeigh simply failed to see him there. I accept Mr Robley's observation that this is something that can happen, and I believe that his conclusion that is what happened on this occasion is probably correct.

[12] Mr McVeigh's failure to ensure that it was safe to engage the power take off was the principal cause of the plaintiff's injury. I am satisfied that Mr

Brown is therefore vicariously liable for the negligence of his employee, Mr McVeigh, because the precaution of turning off the engine was such an elementary, simple, obvious and well-understood precaution that was not followed on this occasion undoubtedly constitutes negligence on Mr McVeigh's part.

[13] Mr Hyndman's case against Mr Brown is also based on breach of statutory duty, and I will consider the provisions and effect of the Provision and Use of Work Equipment Regulations 1998 (the Equipment Regulations) in greater detail when I turn to consider the plaintiff's case against Mr Bradley. It is sufficient to state at this stage that the plaintiff's claim also succeeds against Mr Brown on the basis of a breach of the Equipment Regulations. The harvester was clearly "work equipment" within the scope of Regulation 2(1). Mr McVeigh was employed by Mr Brown to drive the tractor towing the harvester and was responsible for operating the PTO. Mr Brown therefore "had control of" the harvester within the scope of Regulation 3(3)(b)(i) of the Equipment Regulations, and the extent of his control was sufficiently extensive at that time to fall within the scope of the Equipment Regulations.

[14] At this point it is convenient to consider whether Mr Hyndman was guilty of contributory negligence as the second defendant alleges. Mr Hyndman's evidence was that he had never been given any warning about the risk of such a manoeuvre, and in particular was never warned that he should turn off all power sources. I find this hard to accept. He had worked for a considerable period of time on a seasonal basis in previous seasons and is an intelligent young man. After his injury he was taken to Carlisle Infirmary, and a report was produced from a Miss Oisin-Jones, an inspector with the Health and Safety Executive. Her report suggests that she spoke to him at Carlisle Infirmary at 2.00 am in the morning following the accident. In her report she states:

> "He has worked for W S Brown for three years, fully trained in operating tractor and trailer and various other machinery. P McVey (sic) has worked for W S Brown for two years and is also fully trained. When asked about training on unfamiliar machinery, methods seemed adequate. 1-2 weeks spent shadowing, then being supervised by experienced man before left alone with machines. All spoken to knew about safe stop, and recognised that the accident had happened because they were in a hurry and didn't double check everyone was away form (sic) machinery before machinery was turned on."

[15] I accept that Mr Hyndman may genuinely have no recollection of this conversation, he had suffered a very serious injury and I have no doubt was

in very great pain. I find it hard to accept that the medical and nursing staff would have allowed Miss Oisin-Jones to speak to him if they felt that he was not capable of conducting some form of rational conversation, even if he had had painkillers and/or some form of sedative administered to him. I accept that he was aware of what Miss Oisin-Jones refers to as "safe stop".

[16] However, there is no evidence to indicate that Mr Hyndman was ever given specific instructions by Mr Brown or any of Mr Brown's employees about the risks of the manoeuvre he was carrying out. Indeed it was not suggested to him on behalf of Mr Brown that he had been specifically warned about this type of manoeuvre, nor was it suggested to him that he had been shown any of the written forms of guidance produced in the course of the trial that had been issued by the Health and Safety Executive in relation the use of potato harvesters and the dangers of serious accidents which can arise from the use of potato harvesters.

[17] Although the potato harvester being used on this occasion was a towed harvester drawing its power from a tractor, and the harvester which had previously been used was Mr Brown's self-propelled harvester, the harvesting mechanism of both machines is essentially the same, and the dangers are comparable if one engages in the type of manoeuvre that the plaintiff was engaged in. Mr Hyndman was only 20 at the time, although he had some practical training as he agreed with Miss Oisin-Jones, nonetheless his training does not appear to have been as thorough or as systematic as the type of training that Mr Robley obtained in agricultural college. I am satisfied that essentially Mr Hyndman picked up whatever experience he had by working for Mr Brown on a seasonal basis since 2000, and by working on his grandfather's farm. The danger of this type of experience is that it does not alert workers to dangers of which they may either be oblivious or complacent about.

[18] I am satisfied that Mr Hyndman had not been instructed by Mr Brown on the specific need to turn off the engine to ensure the PTO was disengaged before trying to clear blockages of this type. It is clear from the evidence that blockages are common when using potato harvesters, and I am satisfied that it was essential that employees should be expressly instructed how to remedy this type of situation and the precautions which they should adopt. Whilst the dangers of Mr Hyndman's actions were obvious and he should have realised them for himself, as he was young and without formal and systematic training by his employer I consider that a reduction in his damages of 20% for contributory negligence is appropriate.

[19] Mr Hyndman's case against Mr Bradley is framed both in negligence and breach of statutory duty, although, as will become apparent, the principal thrust of the case on behalf of Mr Hyndman as presented by Mr O'Donoghue QC related to breach of statutory duty. I shall consider the case pleaded in

negligence first. It is alleged Mr Bradley failed to provide Mr Hyndman with proper safety instructions in the form of a handbook and by failing to ensure that he was instructed how to take proper safety precautions. I consider these to be the principal allegations that have to be established against Mr Bradley if Mr Hyndman is to succeed against him in negligence.

[20] There is no dispute that the appropriate test in negligence is that laid down in Caparo Supplies Industries Plc v Dickman (1990) 2 AC 605. This establishes that in order for there to be liability each of three tests has to be satisfied by a plaintiff. First of all, that there was sufficient proximity between the parties. Secondly, that it is fair, just and reasonable to impose a duty of care to the plaintiff upon the defendant; and thirdly, that the injury to the plaintiff is reasonably foreseeable. I will refer to the evidence in greater detail later in this judgment when dealing with the allegations of breach of statutory duty against Mr Bradley.

[21] I am satisfied that there was not a sufficient relationship of proximity between Mr Hyndman and Mr Bradley. Mr Hyndman was working for Mr Brown who was his employer on a seasonal basis over the summer. Mr Brown was a very experienced contractor, and I am satisfied that Mr Bradley was justified in believing from his experience with Mr Bradley and Mr Bradley's employees in the previous season that Mr Bradley's employees were highly competent and conscientious. I have no doubt that if he had not been of that view he would never have lent this extremely valuable item of equipment to Mr Bradley to be used by Mr Bradley's employees.

[22] I consider that it is not fair, just or reasonable to impose a duty of care upon Mr Bradley in the circumstances of this case. Undoubtedly the equipment he lent to Mr Brown was complex and could be dangerous to those working with it if they were not familiar with the equipment, but Mr Brown was a very experienced and competent agricultural contractor. Until his self-propelled potato harvester broke down his employees had been working for a considerable period of time with a machine using an essentially identical mechanism to harvest potatoes, the only difference being that Mr Brown's machine was self-propelled, and therefore even more expensive and complex than Mr Bradley's towed machine. There was therefore no reason for Mr Bradley to believe that he or his employees need to give any instructions as to the dangers of working with this machinery to Mr Brown's employees when Mr Bradley lent the machine to Mr Brown. It would be different if Mr Bradley did not know whether Mr Brown's employees were familiar with potato harvesters, or if he had doubts as to their competence in using such machinery, but neither was the case.

[23] I do not consider that the injury sustained by Mr Hyndman was reasonably foreseeable because I do not consider that Mr Bradley should have

foreseen that someone such as Mr Hyndman would remain on the machine kicking at an obstruction and that the driver of the tractor would then engage the PTO without first making absolutely sure that Mr Hyndman had dismounted from the potato harvester and that it was safe to start the engine of the tractor and engage the PTO. This was such an elementary precaution to take and one that was so simple that I consider that it was not reasonably foreseeable from Mr Bradley's perspective that Mr McVeigh and Mr Hyndman would behave as they did.

[24] For these reasons I am satisfied that Mr Bradley owed no duty to Mr Hyndman in negligence and the plaintiff's case in negligence therefore fails against the second defendant.

[25] The principal thrust of the claim on behalf of Mr Hyndman relates to the provisions of The Provision and Use of Work Equipment Regulations 1998 SI 1998/2306 (The Equipment Regulations), and the case against Mr Bradley turns on whether the 1998 Regulations apply to him by virtue of Regulation (3)(b), namely whether he had control of the harvester at the time of Mr Hyndman's injury.

Regulation 3(3) is in the following terms:

> "(3) The requirements imposed by these Regulations on an employer shall also apply –
>
> (a) to a self-employed person, in respect of work equipment he uses at work;
>
> (b) subject to paragraph (5), to a person who has control to any extent of –
>
> (i) work equipment;
>
> (ii) a person at work who uses or supervises or manages the use of work equipment; or
>
> (iii) the way in which work equipment is used at work,
>
> and to the extent of his control."

[26] Mr O'Donoghue QC, supported by Mr Dermot Fee QC for Mr Brown, argued that the Equipment Regulations applied to someone in Mr Bradley's position, that he was an employer, and as an employer was required to comply with the provisions of Regulations 8 and 9 which are in the following terms.

"Information and instructions

8. - (1) Every employer shall ensure that all persons who use work equipment have available to them adequate health and safety information and, where appropriate, written instructions pertaining to the use of the work equipment.

(2) Every employer shall ensure that any of his employees who supervises or manages the use of work equipment has available to him adequate health and safety information and, where appropriate, written instructions pertaining to the use of the work equipment.

(3) Without prejudice to the generality of paragraphs (1) or (2), the information and instructions required by either of those paragraphs shall include information and, where appropriate, written instructions on –

(a) the conditions in which and the methods by which the work equipment may be used;

(b) foreseeable abnormal situations and the action to be taken if such a situation were to occur; and

(c) any conclusions to be drawn from experience in using the work equipment.

(4) Information and instructions required by this regulation shall be readily comprehensible to those concerned.

Training

9. - (1) Every employer shall ensure that all persons who use work equipment have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken.

> (2) Every employer shall ensure that any of his employees who supervises or manages the use of work equipment has received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken."

[27] Regulations 8 and 9 do not apply unless Mr Bradley was an employer, and this in turn requires the plaintiff to show that Mr Bradley came within the terms of Regulation 3(3) of the Equipment Regulations. But before I consider the effect of Regulation 3(3) it is necessary to consider in greater detail the relationship between Mr Brown and Mr Bradley, and the circumstances in which the tractor and towed harvester were lent to Mr Brown by Mr Bradley.

[28] Mr Brown worked for Mr Bradley the year before. Mr Brown was at the time an agriculture contractor in a substantial way of business, and employed a number of employees in various contracting operations across Northern Ireland, in the Republic and, on this occasion, in the north west of England. He was very well thought of in the field of agricultural contracting, and in particular in the specific task of harvesting potatoes. It is common case that he had been consulted by the manufacturers of the particular make of harvester which was being used on this occasion at an agricultural machinery exhibition in West Germany. I also accept that the particular towed harvester being used on this occasion had been operated by Mr Brown himself during the previous season when Mr Brown was also harvesting potatoes for Mr Bradley.

[29] I am satisfied that Mr Brown entered into a contract with Mr Bradley for the harvesting of potatoes that season. The contract price was £300 per acre to harvest potatoes over what it was anticipated would be some 650-700 acres. This was clearly a very big commercial operation and Mr Bradley's outlay to Mr Brown was likely to be in the region of £195,000 to £210,000. As part of that price Mr Brown was required to plant the potatoes, do some spraying of the potatoes, harvest them and then haul them to the grading station. When one takes into account that Mr Bradley was also supplying the seed potatoes and fertiliser, and possibly having to pay for additional spraying, in addition to whatever he was paying the farmers from whom he was renting the land, it is clear that his overall outlay must have been considerably greater than the amount he was contracted to pay Mr Brown.

[30] The tenor of Mr Bradley's evidence was that not only was the harvesting of potatoes on a very large scale, but (weather and ground conditions permitting) once harvesting started the process was intensive and continuous. Mr Bradley's contracts with the various firms he supplied meant

that different areas and varieties of potatoes had to be selected for harvesting as his customers demanded. It appears that his suppliers would request a particular quantity and variety of potato, and then Mr Bradley, or more often Mr Morrison who was his supervisor in this part of the country, would direct Mr Brown's employees which varieties were to be harvested at which location. Lorries would then come to the grading stations and collect the potatoes which were harvested by Mr Brown's employees. This is the process upon which everyone was engaged when Mr Hyndman was injured.

[31] By his contract Mr Brown was required to provide his self-propelled potato harvester, two trailers and two tractors, and a number of employees to operate them. Unfortunately his self-propelled harvester broke down and it proved impossible to obtain the necessary replacement part for a few days.

[32] I found Mr Bradley an impressively frank and straightforward witness. Whilst he is clearly a man in a very substantial way of business indeed, I am satisfied that he does not attempt to shirk his responsibilities and that he tried to present his position in an honest and straightforward fashion. I accept Mr Bradley's evidence as to what then happened. Where his evidence conflicts with that of Mr Brown I prefer his evidence. I did not find Mr Brown an entirely reliable witness, and I believe he tailored parts of his evidence to try to shift the responsibility for what happened onto Mr Bradley because Mr Brown did not have employer's liability insurance at the time.

[32] Mr Brown's evidence was that when his machine broke down and it was realised that some days, perhaps a couple of days, would pass before a replacement part could be brought from the suppliers and installed, he decided to let his employees spend the intervening time servicing the machines in other respects. I reject this version of events. Given the scale and urgency of Mr Bradley's operations it is inconceivable that, provided the weather and ground conditions were good enough to allow harvesting, everyone would simply allow the operation to come to a halt for a couple of days whilst this replacement part was delivered if there was an alternative solution available which would permit operations to continue.

[33] There was such a solution because Mr Bradley had the towed potato harvester available at his farm near Preston, and he agreed with Mr Brown that Mr Brown could have the use of the harvester and the tractor to tow and power it. I accept that no price was agreed for the use of the tractor and harvester at that time because it was anticipated at the time the agreement was made between Mr Brown and Mr Bradley that Mr Brown would only need to use the harvester and tractor for a couple of days. In the event, Mr Brown's self-propelled harvester broke down again, and it was therefore necessary for him to use Mr Bradley's tractor and harvester for a longer period than had originally been anticipated. I accept that Mr Brown was charged for the later period of hire. I believe that at the time the loan of the

harvester and tractor was agreed Mr Bradley did not intend to charge Mr Brown for their use because it was thought that they would only be needed for a couple of days and it was in Mr Bradley's interests that the harvesting continue.

[34] Mr Brown had used this harvester and tractor the previous year and was very experienced in its operation, and Mr Bradley had the opportunity to assess the competence of Mr Brown and his employees on that occasion. He was satisfied that Mr Brown was a very capable contractor, and his staff highly skilled. I accept Mr Bradley's evidence that operation of either a self-propelled or a towed potato harvester is a highly skilled operation. These are complex machines and that can be seen from the photographs which were exhibited in the course of the trial, and from their cost price. Mr Brown's self-propelled harvester cost £160,000 in 2000. Mr Bradley's towed harvester, which he bought as a demonstration model at the end of the season, presumably at something below the normal sale price, cost him £70,500 including VAT. To this has to be added the value of the Renault 640Z tractor of approximately 120/140 horse power which was being used to tow it, and Dr Mairs accepted this meant that the total value of both tractor and harvester was in the region of £100,000.

[35] The Equipment Regulations, and in particular Regulation 3(3), have been the subject of judicial consideration on a number of occasions in recent years. Before turning to those decisions, it is appropriate to place them in the context of the observations made by Lord Rodger in Spencer Franks v Kellogg Brown and Root [2009] 1 All ER 269 at [34] where he said:

> "[34] Civil courts tend to come across health and safety regulations when someone has been injured and is suing by virtue of s 47 of the 1974 Act. Given the strict liability imposed by the 1998 Regulations, it makes good sense for those who have been injured to bring proceedings, wherever possible, for breach of the relevant regulation, rather than to rely on the common law of delict or tort or on the appropriate Occupiers' Liability Act. Nevertheless, when interpreting the 1998 Regulations, it is important to remember that civil liability for injuries is essentially a secondary feature. Their main purpose is not to give those who have been injured a straightforward route to damages, but to prevent them being injured in the first place. If this results in a broad swathe of strict liability in damages, that is simply one consequence of the correspondingly broad scope of the measures adopted to achieve that purpose."

[36] At [46] Lord Rodger referred to the issue of control which is at the centre of the argument in the present case under the heading of breach of statutory duty when he observed:

> "Of course, equipment may be in the control of more than one person and issues about the extent of the control exercised by each of them could arise."

[37] Regulation 3(3) has been the subject of judicial consideration, starting with Ball v Street [2005] EWCA Civ 76. As this case also involved a loan of a piece of machinery by one farmer to another in the course of a contractual arrangement between them it is appropriate to refer to the facts of that case in a little detail. The plaintiff was a farmer who lost his left eye when using a haybob machine owned by the defendant. The defendant farmed nearby, and the plaintiff engaged him to mow, row and bale the plaintiff's hay on some of the plaintiff's fields. The accident happened when the spring on one of the tines of the haybob broke, ricocheted from some part of the machine or from an adjacent pneumatic tyre and entered the plaintiff's left eye. On the day in question the plaintiff had been using the haybob on his own with the defendant's consent because the defendant was not available that Sunday as he was preparing for a wedding. The commercial arrangement between the plaintiff and the defendant was that the defendant would hire out his services, together with the haybob which he owned and maintained.

[38] The leading judgment was given by Potter LJ and the relevant passages are to be found at paragraphs [29] to [32] which I set out below.

> "29. The argument before the judge turned upon the assertion on behalf of the defendant that, on the Sunday of the accident, the use of the haybob was no more than the use of a machine lent by a benevolent neighbour and not as part of a commercial arrangement: *cf* reg. 3(4). The finding of the judge, which was plainly justified on the evidence, was that the use of the haybob on the Sunday (whether it was to be separately charged for or not) was part of an overall commercial arrangement whereby Mr Ball was to pay for the services of the defendant and use of his machinery. Albeit it appears that the defendant did not charge for the use of the haybob on the Sunday, he would certainly have been entitled to do so. Nor does it alter the fact, as the judge found, that in relation to the Sunday in question, the defendant retained control over the use of the haybob in the sense of giving or withholding permission for its use,

who was to use it, how it was to be used and for what purpose (at [23] of the judgment).

30. In those circumstances, it is of little assistance to analyse whether or not, in making his final charges when the job was complete, the defendant would or did add in a specific sum by way of hire for the claimant's use of the machine to achieve early completion of the work which the defendant had agreed to carry out. The defendant fell within reg.3(3)(b) as a person who had "control to any extent" of work equipment and the way in which it was used and (as was not in dispute) he fulfilled the requirement of reg.3(4) that such control was in connection with the carrying on of his trade or business, namely hiring out of his services together with the equipment owned and maintained by himself.

31. The defendant could not take advantage of the exemption contained in reg.3(5) which exempts from the requirements of the Regulations "a person in respect of work equipment supplied by him by way of sale, agreement for sale or hire-purchase agreement". Those words of exemption do not extend to a person who hires equipment, or who "lends" it in the sense that he simply hands over temporary physical control for use by another in circumstances where the opportunity and duty of maintaining the equipment in safe working order remains with him. The intention underlying the Regulations is no doubt that, so far as any commercial relationship is concerned, a line should be drawn between a sale or hire-purchase on the one hand in which the obligation of maintenance and the retention of any control over the equipment may properly be regarded as having unequivocally passed to the transferee, whereas, in the case of short-term hire or loan of equipment in the course of business, that is not so.

32. In these circumstances, I consider that the judge was right to find that the Regulations were applicable to the situation which existed between the parties."

[39] It will apparent from Potter LJ's analysis of the circumstances of that case that, as the trial judge also found, the defendant retained control over the use of the haybob in the sense of giving or withholding permission for its use, who was to use it, how it was to be used and for what purpose. It was against this background that at [31] he observed:

> "The intention underlying the Regulations is no doubt that, so far as any commercial relationship is concerned, a line should be drawn between a sale or hire purchase on the one hand in which the obligation of maintenance and the retention of any control over the equipment may properly be regarded as having unequivocally passed to the transferee, whereas, in the case of short-term hire or loan equipment in the course of business, that is not so."

[40] In Munkman on Employers' Liability 15th Edition at 22.44 the learned authors refer to "the situation where equipment is simply hired or loaned, in which case control has not passed." However, I consider that when one looks at what Potter LJ actually said, he was referring to a "loan of equipment in the course of business", because the circumstances of that case were found by him not to be a gratuitous loan but part of a commercial arrangement. The facts of Ball v Street are therefore distinguishable from the facts of the present case.

[41] The question of control was considered again in two decisions given in May 2008, the first of which is Mason v Satelcom Limited and Another [2008] EWCA Civ 494 where Longmore LJ pointed out at [12] that the phrases "control to any extent" and "to the extent of his control" are crucial, and as Richards LJ pointed out Jennings v Forestry Commission [2008] EWCA Civ 581 at [31]:

> "… the words 'to any extent' in the first line of paragraph (b) of regulation 3(3) [and] the words 'and to the extent of his control' in the last line are of equal importance."

[42] In Mason v Satelcom Longmore LJconsidered the question of control in the following passage.

> "[12] As counsel's submissions make clear, the phrase 'control to any extent' and 'to the extent of his control' are crucial. 'Control' is a word of differing shades of meaning according to its context but the fact that East did not control the way in which the ladder

was used shows that, contrary to Mr Russell's initial submission, they did not have total control. He refined that submission by saying that East had "sufficient control" of the ladder for the regulations to apply. But since they only apply "to the extent of that control" that submission does little more than assert what it wishes to prove.

[13] In my judgment one has to ascertain in relation to a non-employer, whether there was a purpose for which he has such control as he has. The evidence deployed before the judge did not enable him to make any findings about the ownership of the ladder; it might have belonged to East but could equally have belonged to Redbridge or have been brought onto the premises by an unknown workman. It was no doubt this among other things that led him to conclude (para 63) that East had control of it in the sense that they could have either removed the ladder to another part of the building or elsewhere or placed a notice of some kind upon it. I agree with the judge that they did have control to that extent but that was the limit of their control and it does not follow as the judge seems to have thought (para 64 and 74) that the Equipment Regulations then apply; that is because the Regulations only apply "to the extent of" East's control. It is this concept of the "extent of control" that makes it necessary to ascertain whether there was a purpose for which the control was exercised. If East had owned the ladder it might be possible to say (as the court was able to say in *Ball v Street* [2005] EWCA Civ 76 para 69) that control existed *(inter alia)* for the purpose of maintaining the ladder in the state in which it needed to be in order to be an effective ladder. But in the absence of a finding that East owned the ladder, it is difficult to say what the purpose of East's control was beyond the purpose of ensuring that it did not get in anyone's way."

[43] As can be seen from [13] Longmore LJ emphasised that the Equipment Regulations only apply "to the extent of" a defendant's control when he said "It is this concept of the "extent of control that makes it necessary to ascertain whether there was a purpose for which the control was exercised". Mr Boyle on behalf of Mr Bradley laid particular stress on the qualification implied in the requirement that the court consider the extent of the defendant's control when considering whether the defendant had control "to any extent" of the

potato harvester as required under Regulation 3(3). Richards LJ also pointed out in Jennings at [35] and [38] that the question the court has to address is whether the defendant had factual control over the equipment.

[44] One can therefore deduce from Mason and Satelcom and Jennings v Forestry Commission the following principle. The Equipment Regulations only apply to the extent of the defendant's control, and it is the concept of the extent of control that makes it necessary to ascertain whether there was a purpose for which the control was exercised. When applying this approach to the facts of the present case I consider it is salutary to bear in mind the observations of May LJ in Mason v Satelcom Limited at [33].

> "[33] There is a risk that lawyers, including judges, being obsessed with the meaning of abstruse secondary legislation, may lose sight of the real world. In this case, the Claimant was injured by falling off a short, well constructed and well maintained ladder, because he foolishly chose to use the ladder in circumstances for which, and in a way in which, it was unsuitable. His employers rightly bore a major responsibility for the accident, because they had not provided him with, or insisted that he acquired, a suitable freestanding aluminium step ladder to take around to his work in his car. He himself rightly bore a significant degree of responsibility, because his use of the ladder was foolish. The proposition that East should also be partly responsible for the accident, by strict application of a regulation mainly about employers, whose meaning took more than a day of the court's time to try to understand, is in the real world close to being absurd. East were not Mr Mason's employer; were not at fault; and had nothing to do with the that control. In this case it is submitted that East undoubtedly had some control over the ladder because it was in a locked room in their premises. They could have removed it from the premises altogether. They could have locked it in a cupboard. They could have afforded access to the room but forbidden use of the ladder. I can see some force in the argument that since their control arises from having possession of the ladder, they can be said to have had full control over it because they could have dealt with it as they wished (subject only to the greater right of its true owner). On that basis, East is

deemed to be an employer which is the very result I have castigated as absurd."

[45] Mr Bradley lent the complex equipment comprising the towed harvester and the tractor which provided the power, equipment which was known to jam from time to time in the course of normal operation to Mr Brown, and it was handed over to his employees who had been operating an equally complex and even more expensive self-propelled harvester for the same purpose of harvesting potatoes. Mr Bradley understandably believed that he could entrust his equipment to Mr Brown (a) because Mr Brown had proved himself to be a very competent contractor and someone who employed competent drivers, earlier that season and in the previous season, and (b) in the previous year Mr Brown himself had actually used this particular machine. I am satisfied that Mr Bradley lent the equipment to Mr Brown because he wanted Mr Brown to be in a position to fulfil Mr Brown's contract to him so that Mr Bradley in turn could fulfil his contracts with his suppliers.

[46] Once the equipment was handed over Mr Bradley did not exercise any control over the manner in which the machine was to be operated by Mr Brown's employees. Mr Bradley anticipated that if any small repairs were needed on site Mr Brown's employees would be sufficiently experienced and competent to carry out what one might refer to as running repairs in those circumstances. If more extensive work was required which would require a local agent to come out and work on the machine then Mr Bradley anticipated that he would arrange for this to be done and bear the cost. Because it was anticipated that the loan would be a short term one no question of payment for the use of the equipment by Mr Brown arose at that time. This was a gratuitous loan to a competent contractor of similar equipment to that which he was using to fulfil his contract to Mr Bradley, and Mr Bradley made this gratuitous loan so that his own business would not be interrupted.

[47] Mr Bradley undoubtedly retained some control over the equipment because this was only to be a short term loan. If I had to consider only whether Mr Bradley "had any control" then I consider that Mr Bradley would fall within the ambit of Regulation (3). But what was "the extent of his control"? He did not have any control over the way the equipment was to be operated once Mr McVeigh and the other workmen took it over. Mr Bradley's manager confined his operations at that point to identifying the fields, varieties and quantities of potatoes to be harvested on any given day in order that Mr Bradley might fulfil his contractual obligations to his customers. How Mr Brown's employees were to operate the machine and harvest the potatoes was entirely for Mr McVeigh to decide as an experienced operator of such equipment. In the nature of potatoes harvesting blockages of harvesters were bound to occur, and if they did occur it was for the operator to clear the blockage. I am satisfied that no one, whether Mr Bradley,

Mr Brown or Mr Brown's employees, or any one else, expected Mr Bradley to instruct Mr Brown's employees as to how they were to operate the harvester. No doubt it would be different if they were untried or inexperienced, or if Mr Bradley did not know that they were experienced and competent people who could be expected to use the machinery properly. If that were to be the case then one could expect him to enquire about their training in health and safety measures and to provide instruction material as required by Regulations 8 and 9. He did not provide any such instructions or any such material and unless he is within the ambit of Regulation 3(3) he is not required to do so.

[48] I conclude that Mr Bradley did not have sufficient factual control of the potato harvester and tractor at the time of the injury to Mr Hyndman to come within the scope of Regulation 3. Accordingly Mr Hyndman's claim of breach of statutory duty fails against the second defendant and his action against the second defendant is dismissed.

[49] Mr Hyndman suffered what Mr Wallace described in his report of 21 March 2006, that is 2½ years after the injury, as

> "a severe crushing and degloving type injury to the lateral aspect of his right lower leg, ankle and dorso-lateral aspect of the right foot with a further wound on the medial aspect of the right lower leg as a result of the harvester injury detailed above. This would have been a very painful and frightening experience. There would not appear to have been any bony injury but there was a significant soft tissue damage."

[50] Mr Wallace's view was that the injury has healed well but is very unsightly in appearance. He was of the opinion that Mr Hyndman had good ankle and foot function and considered that it was not unreasonable that he would continue to experience sharp pain but this was likely to be a diminishing problem. He considered that it is unlikely that this problem will cause Mr Hyndman disabling problems in the long term. Mr Hyndman's evidence was that he had always wanted to drive an HGV lorry even before he suffered his injury because his grandfather was a lorry driver by occupation, and Mr Wallace commented that "work as and (sic) HGV lorry driver was be entirely reasonable for this gentleman at this time".

[51] Mr Wallace reported again on 27 November 2009. His view that whilst a period of six months off work as a lorry driver was reasonable, the plaintiff might reasonably be off work for up to a year after a severe injury of this type. This contrasts with the view of Mr Yeates on behalf of the defendant, who said in his report of 9 September 2008 that the plaintiff could work as a lorry driver and that a period of six months off work was reasonable.

[52] Mr Millar, the cosmetic surgeon, reported on 19 July 2006 and recorded that a substantial skin graft had to be placed on the affected area, and that the donor site would have been painful for about ten days. He observed that there was considerable disfigurement which was associated with residual tenderness over the lateral side of Mr Hyndman's ankle and that there remained a risk of breakdown of this tissue if he knocked it. I accept the evidence of the plaintiff, supported as it was by his mother whom I find to be a reliable and truthful witness, that he has suffered bleeding from this area from time to time.

[53] Dr Keegan on 19 October 2007 concluded that Mr Hyndman was now fit for work in keeping with his experience and education, and that stockings were available with cushioning which would assist in protecting the area of injury. The plaintiff's evidence about this was somewhat contradictory and I am satisfied that he has been aware that such protective socks are available, as his sister is an occupational therapist who has advised him about coping with the effects of his injury.

[54] The plaintiff remains incapacitated to some degree, and I am satisfied that whilst it is technically possible for him to work as an HGV lorry driver in that he can mechanically perform the necessary actions required to drive a lorry, the limitations imposed in a practical sense upon his ability to work stemming from his injury are such that he will find it difficult to get such work. He said, and in this respect I have no difficulty in accepting his evidence, supported as it was by his mother's account of his general well-being, that when he came to do the heavy unloading work that goes with most HGV lorry drivers work that he found it very difficult to cope and this in turn restricted his chances of employment.

[55] Mr Boyle and Mr Dermot Fee submitted that the appropriate level of general damages was £60,000, whereas Mr O'Donoghue submitted that the appropriate category at page 32 of the Green Book was either (e)(iii) or (iv) and that the proper value fell in the range of £75,000 to £100,000 for general damages.

[56] I took the opportunity to view Mr Hyndman's leg in chambers in the presence of counsel. A clear indentation has been left in his ankle by the effect of the roller on the left inner aspect of the right ankle, that is pale but nonetheless obvious. The right outer aspect of the right ankle and foot are discoloured and indented where the skin is degloved. The site of the injury is low and I have no difficulty in accepting that, as he says, he has trouble with boots or high sided shoes. The injury removed the skin and outer flesh from the inside of the right calf exposing the muscle underneath. This covers a large area of his calf and is extremely unsightly. The cosmetic effect of his injuries is therefore very substantial. I accept that the functional aspect is also

very substantial because of the pain in his ankle if he is hunkering down, and pressure on the skin of his ankle leads to bleeding. I should record that it was not considered necessary that I should be shown the donor area of the graft on the left upper thigh, and I was told that this has resulted in no cosmetic defect. I consider the appropriate award for general damages is £70,000.

[57] There is a claim for travel costs of £2,569.32. Whilst this was not formally proved the evidence of Mrs Hyndman about the travel of herself and other members of the family to be with their son as he convalesce after the major operation he underwent at Newcastle was not challenged and I am satisfied that this amount should be allowed.

[58] Mrs Hyndman took two months of work to look after her son, no figure was put on this, although Dr Keegan accepted that it was an appropriate period for her to look after her son. She is a school teacher but in the absence of any specific figure I can do no more than make an estimate of her net earnings and I award her £2,500 under this heading.

[59] Part of Mr Hyndman's pleaded case relates to the cost of care to date and in the future, and reliance was placed on a care report prepared by Andrea Wets, an occupational therapist employed by Breda Jamison Occupational Therapy Consultants, although Mr O'Donoghue did not press this part of the claim, although he argued for a significant element of care for the first year, or even more, in his closing submissions. I am satisfied that the evidence of Mr Wallace, Mr Yeats and Dr Keegan renders the greater part of the care claim simply unsustainable. Significant though Mr Hyndman's injury was, he does not need the level of care suggested in this report, and I prefer Dr Keegan's assessment that he only required care for two hours per day in the three months after his return from hospital on 26 September 2003, and one hour per day until he was able to resume driving in April 2004, say seven months. No issue was taken with the care rate at the time of £10.54 per hour put forward by Miss West, and I allow this rate. Three months care at two hours per day =168 days, and seven months at one hour per day =196 days, a total of 364 hours at £10.54 per hour=£3836.56, and I allow this amount.

[60] The question of loss of earnings to date and in the future is not straightforward, not least because there has been no evidence from Mr Hyndman as to what he was earning at the time, and what he has earned since, other than references to some of the jobs he had for a short time, and what has been pleaded. It is for a plaintiff to place factual evidence before the court as to what he earned and what he might earn, and in the present case the focus of the evidence was on what Mr Hyndman could or could not do, rather than what he might hope to earn from what he could do. I have therefore to do the best I can to assess what sort of work he might have got had he not been injured, and what he might hope to get now.

[61] He is clearly someone who prefers an active, outdoor life to a sedentary, indoor occupation, and his ambition was always to become an HGV driver like his grandfather. Before he was injured he did seasonal farm work in the summer, and other work when he could find it in the winter. He now has an HGV licence, but I accept that whilst he can do some work as a lorry driver, his ability to do so is handicapped by his injury. He accepts he is fit for light work, and even feels he could do some seasonal farm work such as slurry spreading, and he helps his grandfather out about his farm when necessary. However, casual unskilled seasonal farm work is not easy to get in the present climate of falling farm incomes, and had he not been injured I think that he would have been forced to seek alternative employment, and may well have been unsuccessful in finding congenial work in any event. I consider that he is fit for a sedentary, indoor occupation if he could find one, but in the present climate probably would have been unemployed since his injury until the present time. I therefore make no award for loss of earnings to date.

[62] However, I accept that he is at some disadvantage in the labour market in the future, and the heading of Smith v Manchester damages has to be considered. This is not a case where the court can make a precise estimate of the effect of his disability upon the plaintiff's earning potential in the future as there was no evidence before the court as to rates of pay and employment opportunities in other occupations that might have been, or might now be, open to Mr Hyndman. I therefore have to approach this issue on a broad brush basis as can be seen from the interesting discussion of various authorities in this area in McGregor on Damages, 18th edition, at paras. 35-095 and 35-096. I award him £10,000 under the heading of Smith v Manchester damages.

[62] There will be judgment against the first defendant for damages as follows.

Personal injuries, pain and suffering		£70,000.00
Smith v Manchester award		£10,000.00
Travel cost		£ 2,569.32
Cost of care		£ 3,836.56
Mother's loss of earnings		£ 2,500.00

	Total	£88,905-88
Less 20% contributory negligence		£71,124.70

There will therefore be judgment for £71,124.70 and interest, together with costs, against the first defendant, and judgment for the second defendant against the plaintiff. I will hear the parties on the question of the second defendant's costs against the first plaintiff.