

Neutral Citation no. [2007] NIQB 122

Ref: **HIGF5775**

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

Delivered: 08.03.07

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

JOHN SIMPSON HERBISON

Plaintiff;

-and-

GEORGE McCOOKE

First Defendant;

- and -

DON LOGAN

Second Defendant.

HIGGINS LJ

[1] The plaintiff was born on 10 December 1946 and is now 60 years of age. On 9 July 1997 he was on land belonging to the second defendant in the company of the first defendant when an explosion occurred as a result of which he sustained a serious injury to his left leg. The parties have agreed that if liability is established the plaintiff is entitled to receive £70,000 in compensation for his injuries.

[2] The second defendant is the owner of premises on the main Ballymena to Ballymoney Road, known as Logan's Fashions. At the material time he leased parts of the main building as well as other buildings and areas surrounding it, to various tenants who carried on business there. One of the tenants was the first defendant who operated a garden centre on the premises, having leased that part of the premises from May 1997. The second defendant also owned about 80 acres of rough land at Frocess' Road, about a mile from

Logan Fashions, which he acquired in two lots. The second lot was acquired in 1993 and comprised the two locations with which this action is concerned. This was known as Frocess' Moss and ran from the main road to the river. The plaintiff identified the scene of his injury as not far from the main road and close to hen houses owned by the second defendant. The first defendant identified the scene as further towards the river, which I accept. I consider the plaintiff is mistaken about the location probably due to the arrival of the lady he associated with the hen houses shortly after he was injured, as well as the shock he undoubtedly suffered.

[3] The plaintiff's case against the first defendant was that he was employed by him on the day in question and that the first defendant owed him a duty of care to ensure he was working in a safe area. The first defendant denied that he was the plaintiff's employer. The plaintiff's case against the second defendant was based in occupier's liability. The second defendant alleged that the plaintiff was a trespasser and not a visitor and that he owed no duty of care in the circumstances. The issues were primarily the credibility of the plaintiff and the two defendants all of whom gave evidence. I found the plaintiff to be a credible witness though his recollection was at time hazy or incomplete. I was not impressed with the evidence of the second defendant who was often prepared to say what might suit his case. The first defendant was more impressive, but some parts of his evidence were less acceptable.

[4] I have considered carefully the evidence of all the witnesses and the submissions of counsel on that evidence. I find the facts on the balance of probabilities to be as follows. The plaintiff worked for the first defendant in his previous business as a monumental sculptor. On occasions he was employed casually by the first defendant and was so employed on 8 July 1997 and on 9 July 1997. On the morning of 9 July he did some odd jobs for the first defendant. In the early afternoon he was requested to assist in the removal of some rubbish to Frocess' Moss for burning. Gary Reid, who was a sheltered employee of the second defendant, asked the plaintiff and the first defendant to take some of the second defendant's rubbish to the dump as well.

[5] Prior to the purchase of this land by the second defendant the Department of Agriculture had carried out works on the river. They made use of or improved a rough path or lane that ran towards the river and levelled a small area for parking and turning heavy vehicles. The land was generally low lying and ideal for infilling. The second defendant permitted dumping of material on this land probably for the purposes of infilling. He also dumped material there himself and permitted his tenants including the first defendant to do so when required. The size of the infill area increased over time and was probably levelled by the second defendant from time to time. There was probably dumping there with his specific knowledge and consent and other dumping that he permitted or tolerated by persons known and unknown to

him. It was an ideal location for dumping as it was not visible from the main road. Reliance was placed by the second defendant on signs around the dump. These are visible in the photographs and bear the legend 'Strictly no dumping of any sort'. They have not been present for years as alleged and were probably not present in July 1997. They are almost pristine in appearance. Furthermore they are not located in places which would indicate an intention to deter dumping on the site in question. Rather they appear to be located in order to deter dumping in the field behind the sign located on the lane and in the drain behind the sign on the far side of the dump. If intended to deter dumping on the site in question one would expect them to be located on the edge of that site adjacent to the approach lane. The gate leading to the site was probably locked at night by the employee of the second defendant who looked after the hen houses. This fact together with the presence of this employee who could have deterred unwelcome visitors to the site, suggests that access to the site was to some extent controlled and limited to those with permission to be there or who were tolerated. The gate has a handwritten notice on a board stating 'No unauthorised person beyond this point'.

[6] On 9 July 1997 the plaintiff went to the dump with the first defendant and together they off loaded the rubbish from the first defendant's trailer. This rubbish did not contain any metal substance. Someone had dumped rubbish earlier and set it alight and it was still burning on the arrival of the plaintiff. The plaintiff added the rubbish to it and it was set alight by the existing fire. The rubbish they added may have included some rubbish belonging to the plaintiff but this in no way affects the working though casual relationship between the plaintiff and the first defendant. The plaintiff stood to one side to wait for the rubbish to burn as the second defendant expected him to do. The first defendant turned the trailer. Within a short space of time a large tin, probably a paint container, exploded and the plaintiff was struck by part of it, probably the lid and thereby sustained the injuries set out in the agreed medical reports. The plaintiff complained that the metal that struck him was very hot and he noticed a smell of what he described as adhesive. The plaintiff was probably struck by the lid of the drum or barrel which flew off after pressure built up inside the drum or barrel due to the action of the heat from the fires on moisture and any gas within it. The first defendant sought assistance and eventually the plaintiff was removed from the scene by ambulance arriving at Antrim Area Hospital close to 5pm that afternoon. The hospital notes record that he was 'burning rubbish when a paint barrel exploded'. Enclosed drums or barrels close to a fire at such a dump were, according to the un-contradicted evidence of Mr Malseed, a hazard.

[7] On the morning of the 10 July 1997 the second defendant arrived at the garden centre and spoke to the first defendant. The second defendant denied this conversation took place and alleged that he never spoke to the first defendant or the plaintiff about how the injuries were sustained. He said he

learned about the accident from the employee who looked after the hen houses who told him that the plaintiff had been hurt when dumping material with the first defendant and he named the first defendant. It is more probable the substance of the conversation between the first and second defendant did take place. According to the first defendant the second defendant inquired what had happened. The first defendant told him that a barrel exploded and struck the plaintiff on the leg. The second defendant responded 'that will be your man Ball, those will be paint drums, he sprays farm buildings. Don't say I give you permission to go down there as that will land me in it (or in the ..it)'. He appeared cross. The first defendant said 'For God's sake Don, this man has a really bad leg and if that is the best you can come up with get the f... out of here'. The substance of this conversation confirms that the second defendant was well aware of the dumping that was taking place and permitted and tolerated it and that he was also aware of the nature of the material being left there. There are two brothers named Ball in the neighbourhood. One lived in 232 Frocess' Road which is a short distance from the entrance to the dump. The house is owned by the second defendant and Ball was a tenant. The house is shown in photograph 1 of the album produced by the second defendant. The other brother lives in Glarryford and is a paint sprayer as well as a farmer. The second defendant employed a man named White to look after the hen houses and the land. According to the second defendant he heard the ambulance but did not go out to investigate what had occurred. It would seem the presence of the plaintiff and the first defendant did not alert his suspicions.

[8] The first defendant as employer owed a duty of care to the plaintiff to ensure that the area in which he was required to work was safe to do so. It is clear that the drum or barrel was in the area and close to the fire. It is not clear how near the fire it was. However I do not think this is significant. As Mr Malseed the Consulting Engineer engaged on behalf of the plaintiff said, the area should have been inspected before the rubbish was added to the fire and the barrels identified as a hazard and appropriate precautions taken. None were taken therefore the first named defendant, as employer, is guilty of negligence through failing to provide a safe system or place of work for the plaintiff.

[9] It was the second defendant's case that the plaintiff and the first defendant were not lawful visitors to the second defendant's lands but trespassers to whom the second defendant owed no duty of care. I am satisfied that the plaintiff and the first defendant were visitors to the land and that they were present with the second defendant's permission. I am equally satisfied that that the second defendant was well aware of dumping on his land and that he facilitated it and was aware of the type of material that was being placed or burnt there. Therefore as occupier he owed a duty of care to those who were visitors to the dump depositing their own or the second defendant's rubbish or both. The duty of care as expressed in section 2(1) of

the Occupier's Liability Act (NI) 1957 is to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he entitled to be there. Where the duty relates to an operation involving fire and/or potentially explosive or combustible substances or material, a high degree of care is required, though the duty of care is not absolute. An occupier of land who authorises, as here, whether expressly or by implication, persons to dump and incinerate material on his land, he owes a duty of care to those present on the land to ensure that they will be reasonably safe from injury due to the incineration process while on the land. The plaintiff was present on the second defendant's land as a lawful visitor. The second defendant permitted other persons to dump material on his land and to incinerate the material. It was no surprise to him that this material included barrels or tins, which formerly contained toxic substances, though it is not suggested in this instance that the toxic nature of the substance previously contained in the drum or barrel was solely instrumental in the explosion. The second defendant permitted the first defendant and his employees to dump and incinerate material including the second defendant's material on the same site and it was natural for those incinerating material to do so on the remnants of the fire created by others. Allowing or permitting barrels or drums which are a hazard to be at the dump and close to the fire was negligent and in breach of the duty of care owed by the occupier to those permitted to be on his land. Therefore the second defendant is liable as occupier to the plaintiff as visitor in respect of the injuries sustained by him.

[10] There will be judgment for the plaintiff in the sum of £70,000 with costs against both defendants.