Neutral Citation no. [2003] NIQB 75

Ref:	**WEIC4071**

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

Delivered:	**19.12.03**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

WILLIAM DAVID LARMOUR

Plaintiff

and

MINISTRY OF DEFENCE

Defendant

WEIR J

[1] This action in respect of injuries allegedly sustained by the plaintiff while in the employment of the defendant was begun in the County Court and removed to the High Court by order dated 18 September 1998. At the conclusion of the Plaintiff's case Senior Counsel for the Defendant made a submission of no case to answer to which I acceded. I now give my reasons for doing so.

[2] The Plaintiff's claim arose from an injury which he alleged that he sustained while in the course of his employment as a driver with the defendant. The case as made in the amended Statement of Claim and as opened by Mr McNulty QC was that on 8 June 1995 the Plaintiff was sent to Kinnegar Army Base with two batteries that required to be replaced at the battery store there. The battery store was a large shed accessed by a concrete pathway that lead from the internal road system to a roller shutter door. That pathway is wide enough for a vehicle to be driven up it to the doorway from which point the batteries can be manually carried inside. The case made was that on this particular occasion the access to the pathway was obstructed by a large lorry parked across it on the roadway so that the Plaintiff was obliged to park on the roadside and to walk across a grassed area between the roadway and the entrance to the battery shed. The allegation was that while one of the batteries was of normal weight the second was much heavier, of the order of 73-74 lbs and without carrying handles. The crux of the Plaintiff's case was that, having successfully carried the lighter battery to the store by this route he was then carrying the heavier battery when he slipped and fell on the grass which was wet and the battery fell on top of him.

[3] The Plaintiff said that he informed a member of staff at the battery store that he had hurt his back and made a similar report to his superior when he returned to his base at Hydebank. He claimed that he was unable to continue working and never returned to work after that day. He complained of pain in his back, neck and shoulders and was certified as unfit by his doctor. He received full pay for six months and thereafter half pay for a further six months. In 1998 he was sent for by his employers and on 18 January 1999 he was medically retired by the Defendant. In his Medical Retirement Certificate which was put in evidence by agreement the nature of the Plaintiff's disablement is described as:

> "Arrhythmias (cardiac) NOS".

The Plaintiff's evidence was that he understood that he was medically discharged because of his back injury but that is evidently not the cause given on the certificate and it is right to say that the Plaintiff had prior to his present accident had some slight heart symptoms which disimproved until ultimately he was obliged to undergo major cardiac surgery in July 2002. The Plaintiff also suffered a back injury in the latter part of 1996 when a car drove into the rear of the Plaintiff's car. He received compensation for those injuries.

[4] The Plaintiff was cross-examined at length by Mr Ringland QC for the Defendant. In the course of detailed and searching questioning many inconsistencies and absurdities in the Plaintiff's account of the accident were exposed. The following are examples:

(a) When it was suggested to the Plaintiff that he had not told his GP about the complaint of persisting pain in his shoulders he first said that he believed he did tell him but later said "I could have overlooked it".

(b) It was pointed out that in the history given to Mr Halliday who was advising on the Plaintiff's behalf it is recorded that the Plaintiff's neck has not been affected by the injury in 1995 whereas he claimed in evidence to have had pain it ever since the accident. The Plaintiff offered no explanation.

(c) His GP, Dr Alcorn, recorded on 21 February 1996 that on the Plaintiff's discharge from physiotherapy on 10 August 1995 the physiotherapist reported that his symptoms had settled to "only slight ache after prolonged sitting and walking uphill." The Plaintiff's response to this was that following the physiotherapy he did indeed get relief for a period which he estimated at 12 hours and he claimed that that was the only respite which he had had from his neck pain in the intervening 8½ years.

(d) When asked about numbness due to the injury he said that the left calf had gone numb on several occasions but it was pointed that he had told Mr

Wallace who was advising the Defendant that sometimes his whole leg goes numb.

(e) He told Mr Ringland that on occasion he had had pain down his left leg but never down his right leg. It was then pointed out that he had told Mr Wallace on 16 October 2000 that he has pain extending down both legs.

(f) He claimed that he had used a walking stick for a period of 3 years and that most times he had the stick with him. He was asked why he had never either shown or mentioned the stick to the various doctors and he was asked why, since he said he used the stick in his home, he did not use it when going in and out of the doctors' consulting rooms. To that point he had no answer except that he usually left the stick in the car.

(g) He was asked why in 1999, when he saw Dr Kerr, the psychiatrist, who was advising the Defendant, he had denied any previous neck pain or shoulder pain prior to the present alleged accident and had denied having any previous compensation claims. To that his response was "I didn't think it was relevant. It wasn't a deliberate lie. I did have a claim and got damages for the 1996 accident." He then said: "It was the way he put it to me."

(h) He denied, after some hesitation, that he would be able to go up a ladder and said that he couldn't go up a stepladder unless someone was holding both it and him. It was then put to him that he had been seen up a ladder reaching above his shoulders with a brush to clean the PVC around the top of his carport and then moving the ladder to another location. To this the Plaintiff replied that he would not have been able to move the ladder and then he said that he could not remember.

(i) He claimed that prior to his heart operation he would only have been able to walk a short distance, about six houses. It was put to him that he was seen on an occasion to walk 900 metres along the Ballygomartin Road to his house. His reply was "there is a possibility but I can't recollect." "I was trying to improve my quality of life" "It could have happened one day I just couldn't deny it".

(j) The Plaintiff was shown a Met. Office report relating to the weather applicable to the Kinnegar Barracks, Holywood area that indicated that there had been no rain on the day of the alleged accident or on the previous day and that at 11.00am on 8 June the ground would have been quite dry. The position was summarised in the report thus; "in layman's terms it would have been comfortable to sit on grass at 11.00am on 8 June". The Plaintiff's evidence was that he first arrived at the battery shop at about 11.45am. The Plaintiff described the condition of the grass as "mildewed" but said that he was not aware of any dampness on his clothes as a result of lying on the grass after his fall. He later expanded on his evidence of dampness by saying that

there is always a dampness in the air at Kinnegar; "it is so close to the sea that dampness would have been coming off the water".

(k) The Plaintiff told Mr Ringland that the battery fell on his stomach although in direct evidence he had said that it had fallen on his chest. When this was pointed out to him he indicated an area midway between stomach and chest. He was asked why he suffered no injury from the falling of the heavy battery onto him for which his explanation was; "I tried to support the battery , it didn't come down in a crash".

(l) He was asked whether, having said in direct evidence that he was holding the battery out from him because there was a bit of seepage from it, he got any liquid on his clothes when the battery fell on top of him. To that he replied that he did not because it may have been a sealed battery. When asked about this apparent contradiction in his evidence he then said that he assumed that there was seepage, "there wasn't a visible drip from it".

(m) He was asked about whether he was able to bend down and pick up the battery again after he regained his feet and he said he was but when asked how he managed to lift the battery with his injuries he then claimed that he was pushing the battery in. He was then asked how he was able to carry out the replacement battery if he could not carry the faulty battery in to which his reply was "I just did".

(n) Mr Ringland then returned to the alleged use of the stepladder outside at his home and the Plaintiff said that he now remembered that he was up cleaning the gutter of his carport and that he was two steps up the stepladder and that although his wife was present she was not holding it.

(o) The Plaintiff was asked why he had initially said that he had put the battery on a shelf about 3ft high in the store but subsequently indicated that he had partly put it down and partly dropped it onto the floor inside the door. His reply was "I only assumed that it ended up on the bench. That is the natural place to put it. I could have paused and lifted it again – it looks like it because it ended up on the bench".

[5] Mr Hugh Richard Boyd, a Consulting Engineer, gave evidence of having gone with the Plaintiff to inspect samples of batteries and that the Plaintiff has selected as comparable to the heavier of the two batteries one which the witness weighed at between 70 and 74 lbs. In cross-examination he was asked by Mr Ringland whether he would have expected some evidence of bruising to the Plaintiff if a battery of that weight had fallen upon him, even from a height of 9 inches, and the witness replied that he would.

[6] In the course of his submission of no case to answer Mr Ringland submitted that the Plaintiff's evidence was not capable of belief because he

had time and time again contradicted himself in material ways and had manufactured evidence. He had tried to demonstrate situations that proved to be incorrect, for example his claimed inability to use a stepladder unaided. He also drew attention to Mr Boyd's evidence that he would have expected some bruising from a battery of such weight although the Plaintiff had conceded that there had been no bruising as a result of its allegedly falling upon him.

[7] In reply Mr McNulty submitted that this case fell far short of one in which I could accede to a submission of no case. In his submission, provided the court was satisfied that the weight was too heavy and that the Plaintiff did suffer his back injury while carrying the battery across the grass, the case ought to be allowed to proceed.

[8] In reply, Mr Ringland submitted that Mr McNulty could not now make a new case that the Plaintiff fell due to the heavy weight alone since his case as opened and the Plaintiff's evidence had been that he was forced by the parked lorry to carry the heavy battery across wet grass rather than by a path and that it was that unsafe means of access that had caused the Plaintiff to lose his footing and fall. He relied upon *Graham v E. and A. Dunlop Limited* [1977] NIJB 1 where the Court of Appeal held that an alternative case cannot be left to the tribunal of fact in the absence of positive evidence to support it. In Mr Ringland's submission, as in that case the present case also lacked any positive evidence for a case other than one of slipping and falling on the wet grass that the Plaintiff was obliged to traverse. Mr McNulty could not now seek to substitute a different case that the Plaintiff had not made.

[9] I accept Mr Ringland's submission that I cannot leave to myself as the tribunal of fact a case that the Plaintiff did not make. However there is a more fundamental difficulty in the way of the Plaintiff because, to borrow and adapt the words of Lowry L.C.J., as he then was, in *R v Hassan and others* [1981] N.I.J.B. 9 at page 17, if I am clear (as I am in this case) that in no circumstances could I entertain the possibility of my being convinced on the balance of probabilities by the evidence given for the Plaintiff there can be no justification for allowing the trial to continue.

[10] Ringland commenced his cross examination he focussed initially upon inconsistencies and anomalies in the Plaintiff's various accounts to the doctors and to the court. I was initially somewhat disposed to think that these might perhaps be explained by a combination of the considerable lapse of time since the alleged accident, a Plaintiff's natural inclination not to minimise his injuries and the fact that he had had an accident in 1996 as well as serious heart trouble thereafter. Indeed, in the course of his cross examination I more than once advised the Plaintiff not to give answers if he did not know or could not remember the answers. However as one inconsistency, contradiction or absurdity became piled upon another, particularly in relation

to the alleged circumstances of the accident and its aftermath and as I heard and watched him give his evidence I found myself quite unable to believe the Plaintiff as to the circumstances of his alleged accident. Indeed, even had I felt able to accede to Mr McNulty's invitation to substitute a revised case for that actually made it would not have made any practical difference to my decision because I could never have been satisfied to the requisite standard (or at all) that the Plaintiff did sustain an injury while carrying a heavy battery across grass outside the battery store on this day.

[11] On the same page of the decision in *Hassan* Lord Lowry said this of the complainant in that case:

> "I find him an entirely unsatisfactory witness, avowedly clear at one moment and hazy the next – often on the same point, offering one different explanation after another as he is driven by cross-examination from one insecure foothold to the next until finally his testimony on every important point breaks down in a welter of confusion and unbelief. In other words, the *manner* of giving the evidence, on the frailties of which I have commented, condemns also the *giver* of that evidence as unworthy of belief."

I find that description to be entirely apposite to the present Plaintiff and his evidence in this case.

[12] I accordingly acceded to Mr Ringland's application. Having been informed that the Plaintiff is legally-aided I made no order as to the costs between the parties but ordered that his own costs be subject to legal aid taxation.