Neutral Citation No. [2005] NICA 17 | *Ref:* **KERC5247**

Judgment: approved by the Court for handing down | *Delivered:* **13/04/2005**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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PAUL McDONNELL

Plaintiff/Appellant

and

HARRY HENRY

Defendant/Respondent

and

MARY JOSEPHINE McDONNELL the personal representative of JAMES McDONNELL DECEASED

Third Party

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Before Kerr LCJ, Campbell LJ and Sir Liam McCollum

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KERR LCJ

Introduction

[1] We shall refer in this judgment to Paul McDonnell as the plaintiff; to Harry Henry as the defendant; and to Mary Josephine McDonnell as the third party. This is an appeal from the decision of Girvan J dismissing the plaintiff's claim for damages for personal injuries, loss and damage sustained by him as the result of an accident which occurred on 30 October 1997 while he was attempting to start a cement mixer with a starting handle. The accident occurred at the defendant's premises and the plaintiff claims that he was employed by the defendant at the material time. Alternatively, he claims that he was entitled to succeed in his claim against the defendant on the basis that

the latter was in breach of certain employment and health and safety legislation and his common law obligations to the plaintiff.

[2] The defendant joined the plaintiff's mother, in her capacity as personal representative of the plaintiff's deceased father, as a third party, claiming that the plaintiff was employed by him at the material time and that such duty as was owed to the plaintiff was the responsibility of his father. That claim failed with the plaintiff's action but the learned trial judge decided that the costs of the third party should be borne by the plaintiff. Both the plaintiff and the third party were legally-aided. The third party appeals against the judge's order as to costs.

Factual background

[3] The plaintiff's date of birth is 3 December 1963. He was therefore 34 years old when the accident happened. The cement mixer that he was trying to start belonged to the defendant. The mixer was required to prepare cement for a plastering job that the plaintiff and his father were going to carry out at a milking parlour on the defendant's farm. The plaintiff rotated the handle of the cement mixer at speed; it became detached from the mixer and struck him on his left eye causing serious injuries to that eye.

[4] The plaintiff's father had made the arrangements with the defendant about carrying out the work. The plaintiff was not himself privy to these arrangements. He understood, however, that his father had agreed to do the work on the basis that the defendant would supply cement, water and the mixer. The plaintiff's father died before the case came to trial but he had made a statement for the purposes of legal aid and this was admitted in evidence. According to this statement, it had been agreed between the defendant and James McDonnell that the defendant's son, Karl Henry, would act as a labourer. The defendant denied that this was part of the arrangement.

[5] The plaintiff and his father had carried out plastering work on a bungalow being built for the defendant's son, Paul, some years before. On that occasion the defendant had supplied the materials and the cement mixer. The plaintiff had been paid by his father for the work that he had done on that occasion and James McDonnell had received payment from one of the defendant's sons. The learned trial judge declared himself satisfied on the evidence that the arrangement made for the work to be carried out in October 1997 involved the plaintiff's father bringing his son as his assistant to the farm, with the father proposing to pay the plaintiff out of the moneys that he received from the defendant.

[6] On the day of the accident the plaintiff and his father arrived at the respondent's farm early in the morning. They heard music coming from the milking parlour and they went over to the parlour where they found the

defendant's son, Karl, who was working there. According to the plaintiff, Karl said he would be over to help with the work when he "got a chance". In evidence Karl said that it was not his understanding that he was to help; that no conversation had taken place in the milking parlour; and that no-one had spoken to him. On this issue the trial judge concluded that the plaintiff did go over and speak briefly to Karl and that the latter had probably said something along the lines that the plaintiff recalled. The learned judge indicated, however, that the resolution of this factual issue in favour of the plaintiff was not relevant to his final decision.

[7] The plaintiff then went to the cement mixer. He had not been trained in the proper grip to use to start the machine. He attempted to start it by turning the starting handle. He gave evidence that his first turn was not particularly forceful and the machine did not start. He made a second attempt using more strength. With this stronger turn the handle came off the crankshaft. The plaintiff claimed that the handle continued to rotate after it left the crankshaft and it struck him on the face, breaking his glasses and cutting his eye. The impact stunned him and caused him to fall to his knees. He did not have a very clear recollection of what happened after that.

[8] The plaintiff's father, in his legal aid statement, said that the plaintiff had had to stoop very low because the mixer was near to the ground and that when he swung the handle it came off and struck him on the left eye. The defendant did not accept that the plaintiff had been struck by the starting handle. It was suggested on his behalf that the plaintiff might have fallen or that the accident could have happened in a number of different ways. Girvan J dismissed these speculations, however, and said that he was satisfied that the plaintiff had indeed been struck by the starting handle.

[9] In the course of the trial of the action it was agreed by the parties that the cement mixer and the starting handle were not defective. The plaintiff's engineer accepted that the grip that the plaintiff had actually adopted did not contribute to the accident. His lack of training was therefore not material to his having been struck by the handle. The engineer suggested that the most that might be expected of an employer was that he should simply tell an employee not to let the handle come off prematurely and to hold it in position while trying to start the machine. But in none of the published material was there a specific warning of the need to keep the handle in position on the crankshaft while starting the machine. Although goggles could have prevented the accident, any recommendations about the wearing of goggles were in relation to the loading of the mixer with materials (because of the risk of cement dust getting in the eyes of the operator) and not in respect of the actual starting of the mixer. The plaintiff's engineer did not suggest that goggles should have been provided.

Statutory background

[10] The principal statutory enactments relied on by the plaintiff were:-

(a) the Health and Safety at Work Order (Northern Ireland) 1978;

(b) the Management of Health and Safety at Work Regulations (Northern Ireland) 1992;

(c) the Personal Protective Equipment at Work Regulations (Northern Ireland) 1993;

(d) the Provision and Use of Work Equipment Regulations (Northern Ireland) 1993, and

(e) the Construction (Health, Safety and Welfare) Regulations (Northern Ireland) 1996.

[11] The Health and Safety at Work Order (Northern Ireland) 1978 provides a wide-ranging code to be followed by employers to protect the general health and safety at work of employees. Article 4 of the Order sets out the general duties of employers to their employees, including the duty (article 4 (2) (a)) to provide and maintain plant and systems of work that are, so far as is reasonably practicable, safe and without risk to health. Article 4 (2) (c) imposes a duty on employers to provide such information, instruction, training and supervision as are necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees. Article 5 sets out general duties of employers and the self-employed to persons other than their employees.

[12] Article 5 (1) provides that it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their health or safety. Article 5(2) places a similar duty on self-employed persons.

[13] Article 6 sets out the general duties of those concerned with premises to persons other than their employees who use non-domestic premises made available to them as a place of work or as a place where they may use plant or substances provided for their use there. Article 6 (2) provides, inter alia, that it shall be the duty of each person who has, to any extent, control of such premises or of any plant in such premises to take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that the premises and any plant in the premises or, as the case may be, provided for use there, are safe and without risks to health.

[14] None of the duties provided for in articles 4, 5 or 6 of the 1978 Order gives rise to civil liability. This is the effect of article 43 (1) (a) which provides:-

> "43. - (1) Nothing in this Part shall be construed -
>
> (a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by Articles 4 to 8 …"

[15] Regulation 3(1) (b) of the Management of Health and Safety at Work Regulations (Northern Ireland) 1992 (the management regulations) imposes a duty on employers to carry out a risk assessment relating to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking for the purpose of identifying the measures needed to be taken to comply with the requirements and prohibitions imposed on him by virtue of the relevant statutory provisions. The risk assessment duty covers risk to persons who are not employees of the employer but whose health and safety is at risk owing to the conduct of the employer's undertaking. The management regulations exclude civil liability.

[16] The Personal Protective Equipment at Work Regulations (Northern Ireland) 1993 (the equipment regulations) require employers to ensure that suitable personal protective equipment is provided for their employees and also require self-employed persons to ensure that suitable personal protective equipment is provided for themselves. The circumstances in which personal protective equipment must be provided and minimum requirements as to suitability of the equipment are specified in regulation 4. The equipment regulations also impose requirements, inter alia, with respect to the provision of information, instruction and training (regulation 9) and ensuring that personal protective equipment is properly used (regulation 10(1)). A person who contravenes the equipment regulations is guilty of an offence under Article 31 of the 1978 Order. The duties in the equipment regulations arise only in respect of a direct employer of an employee.

[17] The Provision and Use of Work Equipment Regulations (Northern Ireland) 1993 (the provision regulations) impose health and safety requirements upon employers in respect of work equipment provided for or used by their employees at work. The requirements are also applied to self-employed persons and persons in control of specified premises in the circumstances set out in regulation 4. The appellant relies on regulation 4 (2) (b). It provides:-

> "(2) The requirements imposed by these Regulations on an employer shall also apply -

…

> (b) to any person who has control, to any extent, of non-domestic premises made available to persons as a place of work, in respect of work equipment used in such premises by such persons and to the extent of his control."

[18] The Construction (Health, Safety and Welfare) Regulations (Northern Ireland) 1996 (the construction regulations) impose requirements with respect to the health, safety and welfare of persons carrying out "construction work" (defined in regulation 2), and of others who may be affected by that work. Subject to specific exceptions, the construction regulations impose requirements on: employers, the self-employed and others who control the way in which construction work is carried out; employees in respect of their own actions; and every person at work as regards co-operation with others and the reporting of danger. The construction regulations impose requirements with respect to, inter alia the safety and maintenance of plant and equipment (regulation 26); training and supervision (regulation 27); and the inspection of places of work and the preparation of reports (regulations 28 and 29). A person who contravenes the construction regulations is guilty of an offence under article 31 of the 1978 Order and is liable, on summary conviction, to a fine not exceeding the statutory maximum (currently £5,000) or, on conviction on indictment, to a fine of unlimited amount.

The judge's findings

[19] In relation to the appellant's employment status the learned judge concluded (paragraph [3]):-

> "Having regard to the totality of the evidence and circumstances I am satisfied the plaintiff was not an employee of the defendant. The defendant was not intending to control the father and the plaintiff on how they did the job or the timing within which they did it. The job in which they were engaged was not being done as an integral part of the defendant's farming business. When we try to identify the economic reality of the relationship what emerges is the reality that the plaintiff's father was being brought in to do a one-off job, the defendant relying on the father's past experience to get it done and leaving it to the father to determine how it should be done. The defendant was not involving himself in the job apart from providing the basic materials, the mixer and the

> contribution of an imprecise nature in respect of labouring on the part of his son."

[20] The judge then considered each of the relevant sets of regulations. In relation to the management regulations, he observed (paragraph 10):-

> "The risk assessment duty should cover the risk to persons who are not employees of the employer but whose health and safety is at risk owing to the conduct of the employer's undertaking. As pointed out in *Munkman on Employers Liability* (paragraph 11.31, 13th Edition) an employer who uses self-employed workers or employees from an outside undertaking (and this would apply in the case of the plaintiff) is obliged to supply those persons with appropriate instructions and comprehensive information regarding risks to their health and safety if they are "working in his undertaking". *Munkman* indicates that the relevant risks for those purposes would be those arising from the use of the employer's workplace rather than any risk associated with the work of the worker. The duty under the regulations is to make an assessment of the risks to the health and safety of persons not in his employment arising out of or in connection with "the conduct by him of his undertaking."

The judge noted that:-

> "Mr Hill [on behalf of the plaintiff] did not rely on the management regulations as giving rise to a cause of action but rather in support of his submission as to the width and breadth of the legislation in this field as a whole and in relation the light to they shed on the other regulations on which he relied. However, the narrower interpretation which I consider is to be put on the 1992 Regulations does not advance Mr Hill's case."

[21] The judge held that the equipment regulations did not apply to the plaintiff as he was not an employee. He went further, however, concluding that, even if the plaintiff was an employee of the defendant, the defendant would not have been in breach of any duty imposed by the regulations as the

risk of damage to the plaintiff's eye was not a foreseeable risk. At paragraph 12 of his judgment the judge said:-

> "None of the published data produced in evidence gave any advice or warning on the need to provide goggles in relation to the starting of such equipment as opposed to the provision of goggles in relation to the carrying out of the mixing operation when the mixer is in operation."

[22] In relation to the provision regulations the judge held that regulation 4 (2) (b) applied to the defendant and he elaborated on the measures that arguably ought to have been taken by the defendant in relation to the plaintiff's use of the equipment in the following passage (paragraph 16):-

> "…the defendant did not take steps to ensure that the plaintiff had available adequate health and safety information and it is clear that the plaintiff had in fact received no real training in the use (including the starting of) the concrete mixer apart from observing what his father did. It is clear that he had not been trained in the proper form of grip. Likewise the defendant did not take steps to ensure that the plaintiff had received adequate training for the purpose of health and safety including training in the methods which may be adopted when using (including starting) the work equipment, any risk which it might entail and precautions to be taken. Likewise he did not take any measures in relation to the hazard of the handle being ejected from the work equipment."

[23] However, the learned judge found as a matter of fact that the plaintiff had decided to attempt to use the cement mixer before the defendant was aware of his presence. In this context he discounted Karl Henry's knowledge that the plaintiff was on site, saying that this knowledge could not be attributed to the defendant. The learned judge ruled (paragraph 18):-

> "… that the defendant could only be expected to fall under the statutory duties imposed whenever he was aware that the plaintiff was going to use the equipment. If the plaintiff was himself a self-employed person he had a duty to himself under Regulation 4 (2) (a) to ensure that the equipment was suitable and that he was properly instructed

> to use it. If he was the employee of his father (which seems to me to be the more likely legal position) his father would have been in overall control of him and owed a duty of information and instruction and training which would have been operative from the point where he had agreed to engage his son to do the job."

[24] On the topic of possible liability under the provision regulations the judge further concluded (at paragraph 19) that even if the defendant's duties had arisen before he was aware of the plaintiff's presence on site, he was not at fault in failing to give advice or training to avoid the type of injury which occurred:-

> "The advice suggested by Mr McGlinchey [the appellant's engineer] would not in my view have prevented the accident. The plaintiff did not adduce evidence as to how he would have acted differently if he had been warned or advised as Mr McGlinchey suggested or indeed give[n] the more detailed advice referred to. The accident occurred through an inadvertent withdrawal of the handle from the crankshaft. None of the materials produced by Mr Wright [the defendant's engineer] suggested that the industry regarded the use of the handle as presenting any risk of injury other than the risk of injury attributable to an improper grip which put at risk the bony structure of the thumb."

[25] In relation to the construction regulations the judge said (at paragraph 20):-

> "Mr Hill also referred to the duties arising under the Construction (Health, Safety & Welfare) Regulations (Northern Ireland) 1996. Those Regulations impose duties on employers and persons who control construction work. The defendant did not fall under the statutory duties arising thereunder. If I am wrong in that, by parity of reasoning in relation to the points discussed in relation to the 1993 Regulations I consider that the plaintiff fails on this aspect of his claim also."

[26] On the question of costs the judge ruled that the third party should recover her costs against the plaintiff. Since the plaintiff was legally aided, he directed that that order should not be enforced without further order of the court. The reasons given by the judge for this disposal were that it was inevitable that the defendant, being a host employer, would join the third party who was either the direct employer or at least in overall charge of the work upon which the plaintiff was engaged.

The appeal

[27] For the plaintiff, Mr Hill QC argued that the plaintiff should properly be regarded as the employee of the defendant. In that event it was indisputable, Mr Hill claimed, that the defendant was in breach of both common law and statutory duties owed to the plaintiff. If the plaintiff was not the defendant's employee, however, counsel submitted that identical duties were owed to him by reason of the defendant's status as a main contractor; or as the undertaker of construction works; or as the owner of the relevant equipment and materials. Mr Hill suggested that the content of these duties should be determined by reference to the regulations governing employer/employee relationships. Even if those instruments did not apply in a technical sense to the arrangements between the plaintiff and the defendant, they ought nevertheless to inform the approach of the court to what was legally required of the defendant in the particular circumstances in which the plaintiff was injured. The type of accident the plaintiff suffered would not have occurred, argued Mr Hill, if he had been given proper training, instruction and information. Alternatively, he asserted that the plaintiff should not have been permitted to operate the cement mixer. By allowing the plaintiff to use the equipment, without ensuring that he was sufficiently well versed in its use, the defendant was liable for the plaintiff's injuries, whether or not he was his employer.

[28] For the defendant Mr McCloskey QC (who did not appear at the trial) submitted that on the central issue of whether the plaintiff was the defendant's employee, the learned judge had committed no material error in applying the law to the facts as found by him. In those circumstances the finding that the plaintiff was not the defendant's employee was unimpeachable. Mr McCloskey supported the judge's analysis of the various statutory instruments, save for his finding that article 4 (2) (b) of the provision regulations applied to the defendant. He suggested that the defendant was not a person who had control, to any extent, of the premises made available to the plaintiff as a place of work, or of work equipment used in his premises by the plaintiff.

[29] In relation to costs, Mr Dermot Fee QC for the third party suggested that the defendant's counsel had applied for the order that the judge ultimately made on the express basis that, as the plaintiff was legally aided, an order for

costs against him would be not be effective to allow the defendant to recover his costs. Counsel for the defendant recommended therefore that the third party, who was also legally aided, should not recover costs against the defendant. Although he accepted that the judge did not state that this was the reason that he ordered that the plaintiff should bear the third party's costs, Mr Fee argued that this was to be presumed. In the event that this was the reason for the judge's order, it was submitted that he had exercised his discretion on an erroneous basis. Mr McCloskey pointed out that orders for costs are a matter for the discretion of the trial judge (section 59(1) of the Judicature (NI) Act 1978). He argued that the judge's ruling that James McDonnell was responsible for the way in which the work was to be carried out made it logical that the third party's costs should be borne by the plaintiff.

Employment status

[30] As the learned judge pointed out (in paragraph 3 of his judgment) no single universally applicable test has been devised to resolve the often vexed question of whether a worker is to be deemed an employee – see also *Clerk & Lindsell* (18th Edition) at 5.11. The decision can only be taken on the basis of the particular facts of each specific case taking into account the nature of the relationship between the parties, the type of work to be carried on, the level of control exercised by the party engaging the worker and all other relevant factors, of which there may be many.

[31] Mr Hill urged the court to adopt what he described as the 'realism' test. He suggested that the court's approach to this question should be informed by the consideration that there is a propensity among employers to seek to avoid the constraints of health and safety at work requirements by the fiction that persons in fact employed by them are self employed. He relied particularly on the decision of the Court of Appeal in England and Wales in *Lane v. Shire Roofing Co (Oxford) Ltd* [1995] IRLR 493. In that case the plaintiff was a builder/roofer/carpenter who began trading as a one-man firm and was categorised as "self-employed" for tax purposes. Shire Roofing was a newly-established roofing contractor. Not wishing to take on too many long-term employees in its early days of trading they hired men for individual jobs. Mr Lane fell while carrying on roofing work and in an action against the company it was held at first instance that he was an independent contractor. This decision was reversed on appeal, the Court of Appeal holding that, while the element of control may be important in deciding whether a worker is an employee, it was not necessarily decisive. In the case of skilled employees with discretion to decide how their work should be done the question should be broadened to "Whose business was it?" – was the workman carrying on his own business, or was he carrying on that of his employers? In delivering the judgment of the court, Henry LJ referred to the well known authorities of *Readymix Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; *Market Investigations Ltd v Minister of Social Security* [1969] 2

QB 173; and *Ferguson v Dawson & Partners (Contractors) Ltd* [1976] IRLR 346 and pointed out that the overall employment background was now very different from what it was when those cases were decided. There are more self-employed and fewer in employment and there is greater flexibility in employment with more temporary and shared employment. Of particular importance is the consideration that both workers and employers perceive advantages in the relationship between them being that of independent contractor. From the workman's point of view, being self-employed may bring taxation advantages and some employers were disinclined to take on full-time long-term employees because of what they perceived as onerous conditions in relation to the protection of employees' rights.

[32] Henry LJ discussed these factors and their impact on the question whether a workman was an employee in the following passage:-

> "[15] That line of authority shows that there are many factors to be taken into account in answering this question, and, with different priority being given to those factors in different cases, all depends on the facts of each individual case. Certain principles relevant to this case, however, emerge.
>
> [16] First, the element of control will be important: who lays down what is to be done, the way in which it is to be done, the means by which it is to be done, and the time when it is done? Who provides (*i.e.* hires and fires) the team by which it is done, and who provides the material, plant and machinery and tools used?
>
> [17] But it is recognised that the control test may not be decisive – for instance, in the case of skilled employees, with discretion to decide how their work should be done. In such cases the question is broadened to whose business was it? Was the workman carrying on his own business, or was he carrying on that of his employers? The American Supreme Court, in *United States of America v Silk* [1946] 331 US 704, asks the question whether the men were employees 'as a matter of economic reality'. The answer to this question may cover much of the same ground as the control test (such as whether he provides his own equipment and hires his own helpers) but may involve looking to see where the financial risk lies, and whether and

> how far he has an opportunity of profiting from sound management in the performance of his task (see *Market Investigations v Minister of Social Security,* supra, at p.185)."

[33] The questions raised in these paragraphs of his judgment must be addressed, Henry LJ said, in the context of who is responsible for the overall safety of the workman. Approached in this way we have no doubt that the question whether the plaintiff was an employee of the defendant was correctly answered by the trial judge. It seems to us clear that the plaintiff (or, at least, his father) was in control of the work to be done in the sense that he decided how the plastering was to be carried out. It was never suggested that the defendant would have given instructions as to the manner of doing the work; he merely indicated what he wanted to have done. While the defendant supplied the cement and the mixer, it does not seem to us that this factor looms large in the key decision here. The skills necessary to carry out the work were possessed by the plaintiff and his father and they were in critical control of how the work was to be performed. The supply of cement and the cement mixer was essentially incidental to the carrying out of the job.

[34] Mr Hill suggested that the 'business' being carried on by the plaintiff and his father was in fact that of the defendant because it involved the plastering of a milking parlour which was integral to the defendant's farming activities. It is clear, however, that the 'business' referred to in the extract from Henry LJ's judgment is the working activity actually carried on by the workman at the time rather than the enterprise for which the work is undertaken. In the present case, therefore, the 'business' is the plastering work, not the farming activities of the defendant. Viewed thus it is clear that the business was that of the plaintiff and his father and not that of the defendant.

[35] Mr Hill relied on the endorsement by the Privy Council in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 of the formulation of the test provided by Cooke J in *Market Investigations Ltd. v. Minister of Social Security* where he said (at pages 184/5):-

> "The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes,' then the contract is a contract for services. If the answer is 'no,' then the contract is a contract of service."

It appears to us, however, that this test is inapt to provide the conclusive answer to present case. True it may be that neither the plaintiff nor his father carried on the business of plastering on a full time basis but they were to carry

out plastering work on this occasion and we are satisfied they were do so without guidance or instruction from the defendant.

[36] Likewise it seems to us clear that the economic reality test favours the conclusion that the plaintiff was not employed by the defendant. This was not an instance of the defendant profiting from the work carried out by the plaintiff. Rather it was a case of a farmer who needed a specific item of work to be carried out and who engaged those whom he believed had the necessary skills to carry out that work. However the question is approached, we consider that the reality of the relationship between the plaintiff and the defendant was, as the judge found, not one of employer/employee. If the plaintiff was employed by anyone, it was his father.

Liability of the defendant other than as employer

[37] We have set out at some length above the learned trial judge's analysis of the duties (or the absence of them) owed by the defendant under the various statutory provisions for, in the main, we are in complete agreement with it.

[38] As the judge pointed out, the management regulations implement the Framework Directive (89-391-EEC). The duty imposed by these regulations to carry out a risk assessment relates to such risks as may arise "out of or in connection with the conduct by him of his undertaking". It does not extend to making an assessment of the risks inherent in the working operations themselves. This reflects the relationship between a workman and his 'host' employer and the area of responsibility that each enjoys. On the one hand it is the duty of the host employer to ensure that his premises and the activities that are normally carried out there do not impinge on the safety of the visiting workman. On the other hand, the workman (who is in control of the manner in which he performs his work) is responsible for ensuring that the manner in which that work is carried out is safe.

[39] Mr Hill acknowledged that the management regulations cannot of themselves afford the plaintiff a cause of action since they expressly provide that a failure to adhere to their provisions does not give rise to civil liability. In this instance, as in other contexts, Mr Hill relied on the regulations as providing indicators of the content of the common law duty owed by the defendant to the plaintiff. Even if one accepts the legitimacy of this argument, it cannot avail the plaintiff in the present case, however. If this analogical approach is followed, it would merely point to a duty on the part of the defendant to make sure that his premises and the activities carried on in them did not endanger the plaintiff in the work that he was due to carry out. It could not require him to ensure that the plaintiff was sufficiently alert to the need to keep the starting handle in position while turning it.

[40] In relation to the equipment regulations a similar result is obtained from an analysis of the content of any common law duty based on a comparison with the statutory provision. These regulations apply only to direct employees but even if they pertained to the plaintiff, they would not provide him with a right of action for the reasons given by the judge. As he pointed out, the manner in which the plaintiff sustained injury was not foreseeable. None of the obligations imposed by the equipment regulations would have arisen even if they had applied. The provision of suitable protective equipment and the training that the regulations envisage are related to foreseeable risks. Because of the highly unusual way in which the plaintiff suffered his injury these issues were simply not relevant to the notional employer's obligations. A fortiori they cannot serve to impute the defendant, who was not the plaintiff's employer, with liability at common law.

[41] We do not accept Mr McCloskey's argument in relation to the application of regulation 4 (2) (b) of the provision regulations. The defendant plainly had control of the premises where the plaintiff was using the equipment. Mr McCloskey argued that, for the regulation to be invoked the defendant would need to have had control of the equipment as well as the premises but we do not agree with that interpretation. The regulation stipulates only that the control be exercised in respect of the premises. The phrase that appears in the latter part of the provision "in respect of work equipment used in such premises by such persons and to the extent of his control" deals not with whether regulation 4 (2) (b) applies but with the measure of control required in a particular case for liability to be incurred.

[42] The judge accepted an argument made on behalf of the defendant that the provision regulations could not apply until the defendant was aware that the plaintiff was going to use the equipment. We do not agree. The defendant certainly knew that the plaintiff and his father were to use the cement mixer on the day that the accident occurred. We cannot accept that the defendant's potential liability can only be activated at the moment that he knew that the plaintiff was on site. A simple example illustrates the point. If a defendant knew that a workman was to come on site to carry out certain work but did not know what time he was likely to arrive and was not present throughout the day when, as he well knew, the work was being carried out, it is inconceivable that he could avoid liability simply by remaining unaware of the precise moment of the worker's arrival.

[43] We do agree with the judge, however, in his conclusion that the defendant was not at fault in failing to give advice or training to avoid the type of injury which occurred. As the judge made clear, the accident occurred through an inadvertent withdrawal of the handle from the crankshaft. There was nothing to suggest that such an event had been encountered previously or that this was an eventuality that could reasonably have been anticipated. In these circumstances any possible duty on the defendant to train the

plaintiff or to ensure that he was properly instructed in the use of the cement mixer did not arise. Even the plaintiff's engineer did not suggest that it was necessary to advise the plaintiff that he should not turn the handle unless it was fully engaged on the crankshaft and maintained in position until the machine started. Put simply, if the plaintiff had been given instructions or training in the use of the cement mixer these would not have included the advice that he should keep the handle engaged on the crankshaft because such a precaution would have been deemed so obvious as to render such a warning unnecessary.

[44] Our conclusions on the provision regulations dispose of the plaintiff's arguments under the construction regulations. We share the judge's view that these do not apply to the defendant since he was not in any sense in control of the way in which construction work was carried out (the only possible basis on which it could be argued that they applied). The regulations cannot be prayed in aid of an argument that they indicate the nature of the defendant's common law duty. Even if they applied to the defendant he would not have been in breach of them for precisely the same reason as applies to the provision regulations. The circumstances of the plaintiff's injury were such that none of the duties imposed by the regulations would have been germane to measures that might have been taken to avoid it. The central deficiency in the plaintiff's case is that the bizarre conditions in which his injury was sustained have made it impossible for him to mount a case that a careful and prudent employer, either in discharge of his statutory obligations or in fulfilment of his common law duties, would have taken steps to guard against it. The way in which the plaintiff was injured was, in the fullest sense of that word, unforeseeable.

Costs

[45] In *Johnson v Ribbins and others (Sir Francis Pittis & Son (a firm), third party)* [1977] 1 All ER 806 the Court of Appeal in England and Wales held that where a question arose as to the incidence of costs between a successful defendant and a successful third party in a case where the plaintiff was legally aided, there was no principle that the impact of legal aid should be made to fall on the defendant and third party alike and that the court should therefore order the third party's costs to be paid by the plaintiff and not by the defendant. The court expressed the view that such an order was contrary to section 7 (6) of the Legal Aid Act 1974 (which is in broadly similar terms to article 10 (6) (b) of the Legal Aid and Advice (Northern Ireland) Order 1981) by which the rights conferred on a legally aided person are not to affect the principles on which the court's discretion as to costs is normally exercised.

[46] In this case the only discernible reason for the judge's order is that the defendant would not recover costs against the plaintiff because of his impecuniosity. We do not accept Mr McCloskey's suggestion that it was

logical that costs be awarded against the personal representative of James McDonnell because he was in fact in charge of the working operations and therefore was the person who owed the plaintiff the duties canvassed against the defendant. The judge did not reach any final determination on this issue or on the issue of whether the plaintiff's father was his employer. The defendant's defence of the plaintiff's claim was not in any way dependent on its assertion that such duties as were owed to the plaintiff were owed by his father.

[47] We accept, of course, that the judge has a discretion as to the awarding of costs under section 59 (1) of the Judicature (Northern Ireland) Act 1978 and that this court should be slow to interfere with the exercise of that discretion – see, for instance, *Re Kavanagh's Application* [1997] NI 368, p. 382H/I. We have concluded, however, that the learned judge fell into error in allowing (as we have decided he must have done) the fact of the plaintiff's inability to pay the defendant's costs to influence his decision as to whether the third party should recover her costs from the defendant. In our judgment there was no reason to depart from the conventional rule that costs should follow the event.

Conclusions

[48] None of the grounds advanced on behalf of the plaintiff has succeeded and his appeal against the judge's decision will be dismissed. We have concluded that the judge was wrong to award the costs of the third party against the plaintiff. The third party's appeal against that order will be allowed and we will direct that the third party's costs of the defence of the defendant's claim be borne by the defendant.