Personal injury claim – Whether defendant employed the plaintiff – duties owed by defendant as a host employed in relation to equipment – duty to train and work - Whether defendant is head of duty – Management of Health and Safety at Work Regulations (NI) 1992 – Personal Protective Equipment at Work Regulations (NI) 1993 – Provision and Use of Work Equipment Regulations (NI) 1993 – Construction (Health, Safety and Welfare) Regulations (Northern Ireland) 1996

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Ref: **GIRC3958**

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

Delivered: **18/06/2003**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

PAUL McDONNELL

Plaintiff;

-and-

HARRY HENRY

Defendant

MARY JOSEPHINE McDONNELL

Third Party.

GIRVAN J

[1] In this action the plaintiff who was born on 3 December 1963 claims damages for personal injuries loss and damage sustained by him as the result of an accident which occurred on 30 October 1997 while attempting to start a cement mixer ("the mixer") with a starting handle ("the handle"). The plaintiff's case is that he was struck on the face by the handle thereby sustaining severe injuries to his eye leading to almost complete loss of sight in it.

[2] On the day of the accident the plaintiff was at the defendant's farm near Portglenone with his father Jim McDonnell, now deceased and whose

estate is represented by his widow the substituted third party. They were carrying out the activity which led to the plaintiff's injury. It is necessary to determine the circumstances in which the plaintiff came to be where he was at the time he sustained the injury. The plaintiff was not at that time in employment but in receipt of state benefits. He had gone with his father ("the deceased") to the defendant's farm to do some plastering work in a milking parlour which the defendant had had constructed at the farm. The deceased had made an arrangement with the defendant to carry out the plastering work. The plaintiff was not himself privy to the actual arrangements made between the father and the defendant but his understanding of the position was that his father had agreed to do the plastering work on the basis that the defendant would supply cement, water and the mixer and it was also the plaintiff's understanding that the defendant's son Karl Henry ("Karl") would do labouring work to assist the plaintiff and his father. The plaintiff had himself worked with his father some years previously at the site on the defendant's land where a bungalow was being built for the defendant's son Paul. On that occasion the materials and the mixer had been likewise supplied. The plaintiff had been paid by his father who received payment from the defendant's who was building the bungalow. According to the father's Legal Aid statement which was admissible evidence under the Evidence (Northern Ireland) Order 1997 the defendant's son was to do the labouring. The defendant denied that that was part of the arrangement. There is little doubt from the evidence of the defendant and the plaintiff and the father's statement that the arrangement was legally imprecise and unstructured. No price was agreed, the deceased and the plaintiff being satisfied that the defendant will pay a fair price for the job. In the country in this type of arrangement it appears to be common practice for the farmer or members of the farmer's family to get involved in the job doing labouring work. This would make financial sense in reducing the time taken to do the job and this time to be paid for. On a balance of probabilities I consider that the understanding between the father and the defendant was that the defendant's son Karl would provide some labouring help on the job. although there was no agreement as to precisely how much or when Karl would provide the labouring assistance. I am also satisfied on the evidence that the arrangement made involved the father bringing his son his assistant to the farm with the father proposing to pay the plaintiff rather than the defendant paying the plaintiff direct.

[3] There was a considerable debate during the trial as to whether the defendant and the plaintiff stood in the relationship of employer/employee, whether the plaintiff was an employee not of the defendant but of his father or whether the plaintiff was acting under a contract for services in relation to the defendant. A variety of different tests for the identification of the relationship of employer and employee has been suggested by the courts. As pointed out in Clerk & Lindsell (16th Edition) at 3.03 the only proposition that can be put forward with confidence on the subject is that no single test is of

general application in all cases. Ultimately the decision in each individual case will turn on the view taken by the court of the relationship between the parties as a whole. References has been made in the authorities to a "control test", an "organisational test" and "a multiple test". All are considered potentially relevant. From a legal point of view the employment relationship has become a so-called "cluster concept". In approaching the question it is necessary also to bear in mind the approach of the Court of Appeal in Lane v Shire Roofing Company [1995] IRLR 493. In that case the Court of Appeal said that in the context of safety at work there is a public interest in recognising the employer/employee relationship. While the court should consider whether the worker was subject to control or in the case of a skilled worker whose business it was the operation should be addressed in the context of who was responsible for overall safety at work which was according to Henry LJ a question of law. There is still scope for the intuitive approach of Somerville LJ that "One perhaps cannot get beyond this. `Was this contract a contract of service within the meaning which an ordinary person would give to those words'." (See Cassidy v Ministry of Health [1951] 2 KB 343 at 352-353). 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.

[4] When the plaintiff and the deceased arrived on site early in the morning of 13 October according to the plaintiff they went to look for somebody. He said he heard music from the milking parlour and he and his father when over and spoke to Karl who was doing milking. According to the plaintiff Karl said he would be over when he had a chance. The plaintiff's father in his statement stated that Karl told him to go ahead and he would be down when he finished the milking. Karl said it was not his understanding that he was to help, that no conversation took place in the milking parlour and nobody went to speak to him. On this issue having seen the plaintiff and Karl I consider that on the balance of probabilities the plaintiff did go over and speak briefly to Karl who probably said something along the lines that the plaintiff recalled. The resolution of this factual issue in favour of the plaintiff, however, does not change the final outcome to the case.

[5] The plaintiff went back to the mixer. He attempted to start it. The plaintiff in his evidence has said that he had never been taught how to start a

mixer though he had picked it up from watching his father. He had not been shown how to hold the starting handle correctly or advised as to what dangers were involved in starting up the mixer. In cross-examination he said he felt he was very experienced in the use of mixers although his father had not trained him in the use of the starting of the mixer he had learned by watching him. In order to start the machine it is necessary to put the starting handle onto the crankshaft. The handle has a pawl which must be in position so that the full compression coincides with the upward swing of the crankshaft. The wooden or metal sleeve of the handle must be free to rotate on its shaft. The thumb should be in position alongside the fingers on the same side of the handle. The thumb should not be wrapped round the handle. This is because there can be kickback when the machine starts and a severe kickback can cause a fracture of the scaphoid bone, a not uncommon injury as a result of adopting the incorrect grip. As well as turning the handle the person attempting to start the machine holds down the compressor starting switch which is located further up the engine. The plaintiff in this case had not been trained in the proper grip and the grip which he adopted appears to have been the incorrect grip with the thumb wrapping over the handle. The plaintiff turned the starting handle. His evidence was that his first turn (by which I understand him to mean his first series of turns) was not particularly forceful. The machine did not start. He said he needed a bit more strength the second time round. This time the handle came off the crankshaft and his evidence was that the handle continued to rotate and hit him in the face breaking his glasses and cutting his eye. The blow was a severe one causing him to be stunned and causing him to go down on his knees. He had not a very clear recollection of what happened after that. The deceased in his statement stated that the plaintiff was attempting to start the equipment and had to stoop very low because the mixer was low. The plaintiff swung the handle and it came off and struck him on the left eye.

[6] The defendant denied that the plaintiff had hit himself with the starting handle. It was suggested on behalf of the defendant that the plaintiff may have fallen or that the accident could have happened in a number of different ways. Mr Elliott QC challenged the evidence of the deceased which although admissible evidence he argued was of little weight not being open to cross-examination in view of his death. It was argued that for the plaintiff to hit himself on the face with the starting handle the handle must have come off prematurely the plaintiff must have continued to swing the handle for a time and must have raised his arm towards his face. Such a sequence of events was unlikely. It is not clear what view the deceased had of the events, whether he saw precisely what is recorded in the statement or whether what is recorded in the statement was based on a version of events from an ex post facto explanation of how the plaintiff's eye came to be injured. One must accordingly approach his evidence with caution. Likewise the plaintiff's evidence needs to be approached with caution since he was stunned by the events which caused the injury. However I am satisfied on the balance of

probabilities that the plaintiff did hit himself in the face with the starting handle. I am strengthened in that view in that it is clear that it has been the plaintiff's consistent case from the time of the event. The plaintiff's father took the plaintiff over to the milking parlour and spoke to Karl. Karl accepted that the plaintiff's father said the plaintiff had been hit by the handle. Bearing in mind the contemporaneous nature of the conversation I am satisfied that the plaintiff and his father at that time genuinely considered that the plaintiff had been hit in the face by the handle.

[7] The plaintiff's engineer Mr McGlinchey acquitted the mixer and the starting handle of any defects. He said the handle could have come off the shaft prematurely or the plaintiff could have taken it off prematurely. Although the handle has a pawl this does not keep the handle on the crankshaft as such. The operator must exert a degree of forward pressure to keep it in position. Quite a degree of effort is needed to get the machine started. It was evident to him from the plaintiff's grip of the handle that the plaintiff had not been properly instructed in the proper starting of cement mixer. He accepted that the grip actually adopted by the plaintiff in this case did not contribute to the accident which actually happened. He would not himself go further than to say that an employer 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. Mr McGlinchey himself had a recollection of one case in which a person starting a mixing machine had been hit in the face by a starting handle and his recollection of the circumstances of that case suggested to him that it was a different event from the one to which Mr Wright, the defendant's engineer, referred.

[8] Mr Wright was in agreement with Mr McGlinchey that the cement mixer and handle did not themselves have any defects. Whether the tyres were deflated or not the distance between the operator's hands (one on the compressor switch and one on the starting handle) would have been constant. He could recall only one case of a person being hit on the fact while starting a cement mixer and in that case the machine was at a raised level. He referred to the published material of a number of organisations such as the Health and Safety Executive, the Building Advisory Service, a manufacturer and the Diesel Hire Association of Employers. In none of these documents was there a specific warning of the need to keep the handle in position on the crankshaft highlighted. Goggles are recommended in relation to the loading of the mixer with materials (because of the risk of cement dust getting in the eyes of the operator) but none of the recommendations recommended goggles in respect of the actual starting of the mixer. In this case if goggles had in fact been provided the accident would have been avoided but Mr Wright did not consider goggles were necessary. Mr McGlinchey in his evidence did not suggest they were. Mr Wright said that if he was lending the machine to somebody if would ask if they any experience of operating the machine if they were familiar with the control and if they knew the correct grip and if

was not sure he would demonstrate it. He would not consider it necessary to give instructions not to remove or permit the handle to be removed prematurely.

[9] Mr Hill QC on behalf of the plaintiff in his wide-ranging and thought-provoking submissions argued that the plaintiff was entitled to succeed in his claim at common law and on the basis of statutory duties owed to him. He argued that the claim should be seen in the light of the current policy of the law emerging from the Health and Safety at Work (Northern Ireland) Order 1978 and the relevant European directives. It is clear that the English Act of 1974 (the basis of the 1978 Order) had initially little impact on civil liability since the primary obligations in sections 2-8 (and the equivalent Northern Ireland provisions) are unenforceable in civil law. However now the health and safety law is increasingly dominated by legislation made under the Act (and the Northern Ireland Order in this jurisdiction). Mr Hill argued that the defendant owed the duties of an employer to the plaintiff but even if he was not his employer he was a "host employer" who owed duties of care under the relevant regulations. As a "host employer" he had a duty under article 3(2) of the Management of Health and Safety at Work Regulations (Northern Ireland) 1992 to carry out a risk assessment relating to 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 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.

[10] The Management Regulations implement the Framework Directive (89-391-EEC). 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" so the statement in Munkman seems justified. The wording of Regulation 10 of the 1993 Regulations likewise supports that view since the host employer's duty to the employer from outside the undertaking has a duty to provide information on the risk to employees health and safety arising out of or in connection with the conduct by the host employer of his undertaking. Mr Hill 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.

[11] Mr Hill then focussed on two points. Firstly, he argued that there was a duty on the defendant as a host employer to provide the plaintiff with goggles to guard against the risk of injury to the eyes. Under Regulation 4 of the Personal Protective Equipment at Work Regulations (Northern Ireland) 1993 every employer must ensure that suitable personal protective employment is provided to his employee who may be exposed to a risk to his health and safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective. The protective equipment must be appropriate for the risks involved and the conditions at the place where exposure to such a risk may occur. The duties in the regulations only arise in respect of the direct employer of an employee. As pointed out in Monkman at paragraph 16.10 at page 351 an undertaking using independent contractors is not obliged to ensure that those workers are supplied with personal protective equipment. An argument can be mounted for the proposition that the United Kingdom has not given proper effect to the Temporary Workers Directive 91-383-EEC but whether that be so or not it would not assist the plaintiff.

[12] If, contrary to my earlier conclusion that the plaintiff was not employed by the defendant, the plaintiff was entitled to the protection of the regulations I consider that the defendant would not have been in breach of the duty. The risk of damage to the plaintiff's eye or face was not a reasonably foreseeable risk. The concatenation of events that led to this injury could not be considered as foreseeable. 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.

[13] Secondly Mr Hill argued that the plaintiff was entitled to succeed under the Provision and Use of Work Equipment Regulations (Northern Ireland) 1993 and in particular he relied on Regulations 4, 5, 8, 9 and 12.

[14] Under Regulation 4 the requirements imposed by those regulations apply in respect of work equipment provided for use by employees at work. Article 4(1) makes clear that the duty is imposed on employers. Regulation 4(2) however makes clear that the regulations also have a wider ambit. Regulation 4(2)(b) provides that the requirements apply - to any person who controls, to any extent, 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. It appears thus that Regulation 4(2)(b) would apply in relation to the defendant in this case.

[15] Under Regulation 5 every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is to be used or provided and the employer (or host employer) shall ensure that the work equipment is used only for operations for which and under conditions for which it is suitable. Regulation 8 provides that every employer (and host 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. The information and instructions required should include information or where appropriate written instructions on "foreseeable abnormal situations and the action to be taken if such a situation were to occur." Regulation 9 provides that 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. Under Regulation 12 every employer must take measures to ensure that the exposure of a person using work equipment to any risk to his health or safety from any hazard referred to in paragraph 3 is either prevented or adequately controlled. The hazards include any article or substance "falling or being ejected from work equipment".

[16] It is clear that the cement mixer was a piece of work equipment and "use" includes starting the equipment. The mixer was physically constructed as to be suitable for the purposes for which it was provided. The equipment was not defective (apart from having the deflated tyres which reduce the height by some 4 inches). The deflation of the tyres did not render the equipment unsuitable for the purpose of cement mixer. Accordingly there was no breach of Regulation 5. On the evidence I am satisfied that the defendant did not prior to the commencement of the work by the plaintiff on site 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.

[17] Mr Elliott QC made a number of points in relation to the plaintiff's case under the 1993 Regulations. Firstly he argued that in none of the documents

produced by Mr Wright was any direction or advice given about preventing premature withdrawal of the handle from the crankshaft. If the manufacturers and professional bodies did not consider it necessary or appropriate to give directions and advice in relation to that the defendant could not be faulted for failing to do so. Secondly there was no evidence that the defendant was aware or informed that the plaintiff and his father were on site and about to start work. Mr Elliott argued that the defendant could not be faulted for failing to fulfil any statutory obligation arising under the Regulations whenever he was not even aware that the plaintiff had come on site. There was no evidence as to when the plaintiff and his father would be arriving on site. The defendant accordingly did not have the opportunity to perform the duty before the accident happened. The fact that Karl was aware that they were on site did not assist the plaintiff since Karl was not the defendant. Thirdly, Mr Elliott pointed out that Mr McGlinchey had contended that all the defendant was obliged to do was to advise the plaintiff against the premature withdrawal of the handle from the crankshaft. There was he contended, a break in the chain of causation. The withdrawal of the handle was inadvertent and the advices given would not have prevented that inadvertence.

[18] The position of a person in the position of the defendant differs factually from that of a true employer who is controlling the work of his employee on an hour to hour and day to day basis. An employer must ensure that before the employer starts doing his job or using relevant equipment he has sufficient information and training to use it safely. The defendant had made an arrangement with the deceased for the carrying out of the job. It was not expected or contemplated that the defendant would be involved in the management of the work or its timing or in considering what the plaintiff or his father respectively did. It is clear that the Regulations do impose a duty on him of a potentially onerous nature. I consider, however, 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. The position of the defendant as a host employer in my view in the circumstances of this particular case would only have become operative when the defendant was aware that the plaintiff was about to start the job and use the relevant equipment. Even if the defendant had been aware of his statutory obligations under the Regulations to inform and train (which he was not) and had taken advice as to how he should discharge those duties he could not reasonably be expected to perform the duties until the plaintiff attended at the site in circumstances in which the

defendant had the opportunity to fulfil his duties. The plaintiff decided to attempt to make use of the equipment before the defendant was aware of his presence. Although Karl was on my findings of fact aware that the plaintiff and his father were present his knowledge cannot in the circumstances be attributed to the defendant.

[19] In fulfilling his duties if they had arisen the question arises as to what the defendant should have done in relation to the possibility of the handle prematurely coming away from the crankshaft. The course of action suggested by Mr McGlinchey (that is advising him not to let the handle come off prematurely) would have provided no real assistance to the plaintiff. The plaintiff did not deliberately withdraw the handle. Stronger advice to the plaintiff that he must in no circumstances try to turn the handle unless the handle was fully engaged on the crankshaft and maintained in position until the machine started might be a more meaningful warning or piece of advice. Mr McGlinchey did not suggest that the defendant needed to go that far. In medical negligence cases where it is alleged that the defendant has failed to give a patient a warning as to the risks involved in the particular procedure it is necessary for the plaintiff to prove that he would have acted differently if the advice had been given (see Bolam v Friern Hospital Management Committee [1957] 2 All ER 188 at 124). The advice suggested by Mr McGlinchey 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 gives 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 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. I do not consider that the defendant was at fault in failing to give advice or training to avoid the type of injury which occurred in this case assuming that the duties imposed under the 1993 Regulations were imposed on the defendant before he was aware of the arrival of the plaintiff.

[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.

[21] In the circumstances I have come to the conclusion that the plaintiff has not made out a case against the defendant and accordingly the defendant will be entitled to judgment.