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*(subject to editorial corrections)**

2012/96640

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

_____

Between

CATHERINE ROONEY

Plaintiff

and

WESTERN EDUCATION AND LIBRARY BOARD

Defendant

_____

MR JUSTICE DEENY

Introduction

[1] In this action the plaintiff claims damages against her employer for personal injuries she received, in the form of a serious laceration to her left wrist, on 11 March 2011 at St Anne's Primary School, Londonderry. The case turns on the application of the Provision and Use of Work Equipment Regulations (Northern Ireland) 1999 ("The Regulations"). The equivalent regulations across the water have been the topic of debate in the House of Lords on several occasions in this century.

[2] Mr Rory Donaghy appeared for the plaintiff and Mr Stephen Elliott for the defendant. I am obliged to counsel for their able and succinct arguments, both written and oral. The parties are to be commended on the extent to which they were able to agree the facts of this situation. The matters which remain in dispute are the application of the Regulations and, if the plaintiff succeeds, the amount of general damages to which she is entitled.

The Facts

[3] The following facts have either been agreed or proved by the plaintiff in her evidence before the court on 6 October 2015. She worked as a canteen assistant at St Anne's Primary School and had done so for some 7 years at the time of the accident

in 2011. When her employment commenced she received induction training which included the use of gloves when appropriate. The defendant sensibly accepted that she had not been trained to use gloves while drying items. There was, at trial, no submission that she herself was guilty of contributory negligence because she was not wearing gloves at the relevant time.

[4] This case turns on a mug, photographs of which were supplied to the court. It had been brought in by an unidentified person some time prior to the accident. It was well known that staff would bring in mugs or cups for use in the canteen. The offending mug was never inspected when it was brought in and its provenance remained unknown. Cups or mugs in use would have been inspected while being washed to check for chips or cracks.

[5] On Friday 11 March 2011 the plaintiff commenced work at about 10 am by which time other members of the catering staff were going off on their tea break. The plaintiff, in her capacity as a catering assistant, commenced to wash up in the kitchen. There were a couple of large tins and two mugs sitting on the drainer to dry. She washed two or three dirty tins, using the gloves supplied to her. She then took those off and proceeded to dry not only the various tins but the cups or mugs that were there. While drying the mug bearing the rubric "Miss Piggy" upon it the handle came off the mug and the sharp edge of the detached handle "sliced" open her wrist. I will deal with the nature of the injury at a later stage. She called a caretaker. She felt unsteady due to the accident and the bleeding it caused. She was driven initially to a Health Centre to which her husband came. She was then brought to Altnagelvin Hospital. This was all on the Friday. She was transferred to the Ulster Hospital, Dundonald, which specialises in such injuries and underwent surgery on the following Monday. There was an accident report form of the accident but it was not completed or signed by the plaintiff.

The plaintiff's case

[6] Although raised in the skeleton argument and pleadings it can readily be seen that no evidence was in fact led by the plaintiff to establish a case of negligence against the employer. The plaintiff at trial relied solely on the Regulations. Counsel submitted that a cup constituted equipment within the meaning of Reg. 2 for use at work by the plaintiff. He further submitted that if I found that to be the case Regulation 5 applied. 5-(1) reads as follows:

> "Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair."

These precise words were to be found at Regulation 6(1) of the Provision and Use of Work Equipment Regulations 1992 (GB). They were considered by the Court of Appeal in England in Stark v Post Office [2000] ICR 1013. That court held, at p.1022, that Regulation 6(1), our 5(1), "used language construed as imposing a strict

obligation over many years in the context of the health and safety of employees….. Regulation 6 (1) does impose an absolute obligation ..."

In reaching that finding they relied on the line of cases commencing with the decision of the House of Lords in Galashiels Gas Co Ltd v Millar [1949] AC 275. Mr Elliott does not invite the court to try and depart from such authority.

[7] Mr Donaghy's task therefore is to persuade the court that this cup being dried by the plaintiff when she sustained her accident and which caused her injury was "equipment" within the meaning of our 1999 Regulations. In support of that, in his thorough skeleton argument, he relied on certain dicta of Lord Rodgers and Lord Carswell in Spencer-Franks v Kellogg Brown and Root Ltd et al [2009] 1 All ER 269; [2008] UKHL 46. I shall return to those in due course. Mr Donaghy submitted that their Lordships emphasised that the regulation defined work equipment very broadly.

[8] He also drew attention in support of his argument to two entries to be found in the defendant's discovery. At page 102 of an Educator Manual, the chapter on accident prevention included the following entry:

> "**Crockery**
>
> The catering trade use a large variety of crockery. When handled incorrectly they can result in an injury."

Furthermore, at page 71 of the discovery bundle he pointed out that the defendant's own "School catering risk assessment" expressly refers to the risk of cuts arising from crockery and well as cutlery. In fact Mr Elliott expressly resiled from the suggestion that the plaintiff did have to show here that her accident was reasonably foreseeable. He accepted that if the Regulations do apply it is not necessary for her to prove that.

[9] Mr Donaghy relied on a further passage in the discovery bundle of the defendants, again dealing with risk assessment. At Page 30 of the bundle one finds a document headed:

> "St Anne's Primary School
> Risk Assessment – Equipment
> 2009
>
> Crockery/cutlery – Page 29"

Thus the defendant itself referred to crockery as 'equipment'.

[10] For completeness it is accepted that although the employer did not originally provide this cup it had become part of the generally used stock in the canteen kitchen.

The defendant's case

[11] Mr Stephen Elliott for the defendant pointed out that these Regulations implemented in this part of the United Kingdom Council Directive 89/665/EEC. Article 3(1) of the Directive states that:

> "The employer shall take the measures necessary to ensure that the work equipment made available to workers in the undertaking and/or establishment is suitable for the work to be carried out or properly adapted for that purpose or may be used by workers without impairment to their health and safety."

[12] At one point he relied on the fact that a cup or mug does not come within a list, a non-exhaustive list, of work equipment but Mr Donaghy pointed out that that list was to be found in earlier Regulations but not in the 1999 Regulations with which I am dealing.

[13] Although counsel had very properly drawn the attention of the court to the decision of our Court of Appeal in Melvin Fulton v Vion Food Group Ltd [2015] NICA 10 both accepted that it was not of assistance to the court in this instance. Not only did it deal with different Regulations but the factual basis was also quite distinct.

[14] He particularly relied in his submissions on liability on dicta of Lord Hope and Baroness Hale in Smith v Northamptonshire County Council [2009] UKHL 27 while also referring to dicta of Lord Neuberger.

Consideration

[15] The starting point here must clearly be the text of the Provision and Use of Work Equipment Regulations (Northern Ireland) 1999 (the Regulations). Regulation 2 deals with interpretation and one finds the following at Reg. 2(1)(b):

> "'Use' in relation to work equipment, means any activity involving work equipment and includes starting, stopping, programming, setting, transporting, repairing, modifying, maintaining, servicing and cleaning;
>
> 'Work Equipment' means any equipment, machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not);

and related expressions shall be construed accordingly."

Regulation 3(2) reads as follows:

> "The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work."
>
> (Authorial underlining throughout.)

[16] One notes that Regulation 3(3) provides that the requirements imposed by the Regulations "shall also apply" to a self-employed person or a person "who has control to any extent" of work equipment etc.

[17] Can a mug be "equipment"? The Shorter Oxford English Dictionary, Sixth Edition, has the following definition:

> "(1) Things used in equipping; articles used or required for a particular purpose; apparatus. An item of equipment.
>
> (2) The action of equipping; the state of being equipped; the manner in which a person or thing is equipped.
>
> (3) Intellectual resources."

It appears to me that while it might not immediately occur to one that a cup or mug is equipment it fits comfortably within the definition above of "articles used or required for a particular purpose". The plaintiff is not seeking a strained interpretation of the word when one reflects on its variety of meanings in our language. A mug is an article used for drinking beverages, in the work place and elsewhere.

[18] The exactly equivalent Regulations in Great Britain were considered in detail in Spencer-Franks op cit at [7]. In that (Scottish) case the pursuer (plaintiff, claimant) was employed as a mechanical technician by the first defender (the employer) who, *inter alia*, supplied services to the off-shore oil industry. The pursuer was supplied by the employer to work on an oil platform operated by the second defender. While he was working on the platform, the pursuer was asked to inspect and repair the closer on the door of the central control room. The closer was not working properly. While the pursuer was inspecting the closer, the linkage arms struck him in the face, causing him injury. He relied on the Provision and Use of Work Equipment Regulations 1998 (to the same effect as our Regulations). The Sheriff held the closer was work equipment but the Court of Session held that it was not. On appeal to the

House of Lords their Lordships concluded that giving the definition of "work equipment" its ordinary meaning the door closer was work equipment. People used the door to enter or leave the control room for the purposes of their work. The fact it was being repaired was irrelevant.

[19] Lord Rodgers of Earlsferry considered the meaning of "work equipment" at [48] ff. He said as follows:

> "[49] Precisely because, subject to certain specified exceptions, the 1998 Regulations are intended to cover all kinds of undertakings, reg 2(1) defines 'work equipment' very broadly as 'any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)'. So any machinery, appliance, etc for use at work counts as 'work equipment'. A complication arises, however, because, in the same sub-section, 'use' in relation to work equipment means 'any activity involving work equipment and includes starting, stopping, programming, setting, transporting, repairing, modifying, maintaining, servicing and cleaning'. This has prompted the idea—or fear—that something, which would not otherwise be regarded as work equipment, falls to be so regarded merely because it is, say, being repaired or serviced or cleaned, and so is being 'used' at work in terms of the definition of work equipment.
>
> [50] As is often the case, the definitions in reg 2(1) could perhaps have been drafted more clearly. But in my view they create no real difficulty in the circumstances of this case. The definition of 'use' in relation to work equipment in reg 2(1) applies 'unless the context otherwise requires'. In the definition of 'work equipment' itself, the context does indeed require otherwise.
>
> [51] The machinery and apparatus etc of an undertaking are there to perform a useful, practical function in relation to the purposes of that undertaking. Depending on the nature of its business, the undertaking may, for instance, have lathes for cutting metal, axes for chopping wood, a furnace for refining ore, chalk for writing on blackboards, needles for sewing model dresses, hoists for raising loads, fork-lift trucks for carrying the loads from place to place, and, in the case of a courier business, bicycles, vans or aircraft for carrying letters and parcels. All these pieces of equipment would serve a useful function in the employer's business. So they are 'for use at work' and fall

> within the definition of 'work equipment'. Indeed, many other things may be 'for use at work'—for example, clocks to let the employees know the time, radios for them to listen to music while they work, kettles for them to make tea or coffee and water-coolers at which they can drink and gossip. All these will constitute work equipment—as indeed will, say, screwdrivers or radios of their own which employees are allowed to bring in and use at work."

[20] Counsel submits that if the definition includes kettles and water coolers then by natural inference it should include cups and mugs for they are necessary to drink what comes out of the kettle and water coolers. If chalk is to be included why not cups?

[21] The views of Lord Rodgers find echo in those of Lord Carswell from which I now quote:

> "[73] I do not think that that conclusion [in the Court of Session] can be supported, attractive as the arguments in its favour may be. It seems to me inescapable that the directive and regulations were intended to cover a wide range of objects used in the course of work and that once it is established that such an object is work equipment liability will attach if it is defective in one of the respects specified in the regulations, although the claimant may have been in the course of repairing it when injured.
>
> [74] The definition of work equipment in reg 2(1) is very broad indeed, and one should not restrict that breadth unnecessarily if the intention of the regulations and directive to provide comprehensive protection to workers is to be fulfilled. Everything which comes within the description of 'machinery, appliance, apparatus, tool or installation' is within the definition of the phrase 'work equipment' if it is for use at work. The word 'use' is in turn defined broadly and includes repair. Then under reg 3(2) the employer is liable if the equipment is 'provided for use or used by an employee of his at work', when there is a breach of the requirements. One therefore has to ask first if the item in question is work equipment, then if it is provided for use or used by the claimant at his work. There may be difficulties in particular cases, as Lord Rodger has noted, in distinguishing work equipment from things which constitute part of the workplace, but I agree with him that it may not be wise to draw too sharp

> a distinction, and I would prefer to leave to a future case decisions on where the boundary may lie.

[22] Again one sees the emphasis on the definition of work equipment in Reg 2(1) as very broad. One also notices at the conclusion of [10] Lord Hoffman's observation:

> "The domestic definition requires one to ascertain the purpose of the apparatus etc. What is it for? If it is for use at work, then it is work equipment."

[23] The definition of 'use' in Regulation 2(1)(b) expressly includes cleaning, not surprisingly. Drying is part of cleaning. This is what the plaintiff was doing. When and where was she doing it? She was doing it at her work. The fact that most of the people working in the school were engaged in education does not alter the fact that this lady was a canteen assistant whose duties involved the provision of food and beverages to staff and pupils. A necessary part of that is the washing and drying of the "equipment", pots and pans, cups, glasses and plates, on or in which food and beverages are served.

[24] Likewise it seems to me she brings herself within Regulation 3(2) because she is using the cup as an employee at her work. There is no issue here, as in some of the cases, of it not being the employer's work place. Furthermore, it can be seen from Reg 3(2) that there is no requirement that the employer has provided the equipment. The Regulation expressly applies to equipment which has either been "provided for use or used by an employee of his at work".

[25] I take into account Mr Elliott's citation of Lord Hope and Baroness Hale in Smith v Northamptonshire County Council [2009] UKHL 27. It must be carefully considered. Firstly, the facts were very different. There the claimant had an accident on a ramp at the home of a person she was visiting as a carer. It was not on her employer's premises. The ramp had not been incorporated into their equipment. They had not erected the ramp although they had once inspected it. The court did conclude that the ramp was not equipment within the meaning of Reg 3(2) of their equivalent 1998 Regulations but on very different facts.

[26] Furthermore, without disrespect to those distinguished jurists, the observations of Lord Hope and Baroness Hale were in the context of their dissent from the decision of their Lordships, albeit in the circumstances of that particular case. For example at [17] Lord Hope, after quoting Lord Rodgers above, said this:

> "The situation which gives rise to difficulty is of an employee whose place of work is not confined to the employer's premises or a place over which the employer has direct control because he is in charge of what is being done there."

[27] That is clearly not this case. I also note that at [21] Lord Hope said the following:

> "Deciding whether or not something is work equipment is a separate exercise from that of applying the definition to the cases described in reg 3. As Lord Hoffman put it in Spencer-Franks v Kellogg Brown and Root Ltd para 19:
>
> > 'You must first decide whether some apparatus is work equipment or not and then you decide whether the Regulations apply in respect of it.'
>
> Then there are the words in Reg 2(1): 'any machinery, appliance, apparatus, tool or installation.' They refer to items that can be expected to perform a useful function within and in relation to the employer's business: Lord Rodgers, para 51; Lord Mance para 86. Scope is limited by the words "for use at work (whether exclusively or not)". The words "for use at work" indicate that the item must have some practical purpose in connection with work. This excludes items that are for storage only or for decoration for example, or which cannot be "used" at all such as the floors, walls or ceilings of a building. Whether those words are satisfied will depend on what is done in or by the undertaking that is under consideration".

[28] It seems to me that these words provide no difficulty to the plaintiff once one recognises that the employer here has chosen to operate a canteen in the school and that the plaintiff is one of the workers in that canteen.

[29] Mr Elliott draws attention to the observation of Baroness Hale at [34] to the effect that an i-pod "brought in to listen to while working would not, it seems to me be work equipment" as opposed to the view of Lord Rodgers in Spencer-Franks at [51] that "radios of their own which employees are allowed to bring in and use at work" would constitute work equipment. But that slight difference of opinion is not on the present point. Lord Mance, with whom Lord Carswell agreed and Lord Neuberger was in agreement, said the following at [65]:

> "Since reg 3(2) is dealing with situations where there is a direct employment relationship, I would myself take as the test whether the work equipment has been provided or used in circumstances in which it was as between the employer and employee incorporated into and adopted as part of the employer's business or other undertaking,

> whether as a result of being provided by the employer for use in it or as a result of being provided by anyone else and being used by the employee in it with the employer's consent and endorsement."

[30] In my opinion the plaintiff's case falls four-square within that dictum.

[31] Finally, I observe that although Lord Carswell thought the point was an arguable one it was conceded that the ramp was work equipment in the case of Smith.

[32] Whatever the limits of applicability of these Regulations to employees are, a matter which has troubled these appellate courts, I am satisfied that this plaintiff on these facts falls within the limits of application. The defendant may not have been obliged to provide a canteen at its school but having done so it obviously provides food and beverages in that canteen, serviced by a kitchen, and it does so to staff and pupils. Those who then work in the canteen are using the equipment in the canteen or kitchen as part of their work within the meaning of the Regulations. The pots and pans, cups and glasses used in providing food and beverages are being used "at work" pursuant to Regulation 2(1)(b). There is no reason why they should not be equipment. The defendant's own discoverable document described crockery as equipment. This plaintiff cleaning the cup in question was using it, as part of the equipment of the kitchen as it had become, in her capacity as an employee of the defendant at her work. It is neither appropriate nor necessary for me to consider what would follow if the accident had befallen a teacher or pupil in the school. This lady was a canteen assistant and this was part of her work. I therefore find for the plaintiff on liability, on the ground of breach of statutory duty of the Provision and Use of Work Equipment Regulations (NI) 1999.

Quantum

[33] The court was provided with a medical report from Mr H G Lewis MD FRCSI FRCS(Plast) of 11 June 2012. It disclosed that in the course of surgery on 14 March 2011 it was ascertained that 80% of the tendon of flexor carpi ulnaris had been divided but the ulnar nerve and ulnar artery were not damaged. The tendon was repaired. The plaintiff told me that she was in a cast for 4 weeks and then in a splint for a further 5-6 weeks. She was off work for approximately one year but since returning to work in 2012 has not had further absences from work. In the initial stages she relied to a considerable degree on her husband to help with dressing and housework. There are agreed damages of £1,944 to recompense him for that. Her loss of earnings is subsumed in a CRU certificate in the sum of £3,776.55.

[34] She has been left with a scar which the surgeon describes as "a permanent, fairly modest, cosmetic deformity". I have seen that. It is on the inside of the wrist. It is very slightly puckered.

[35] The surgeon accepts the sincerity of the plaintiff's subjective feeling of weakness in the wrist but says there is in fact no objective impairment. In her oral evidence she put this several times as a "heaviness" in her wrist if she was lifting something heavy. She would lack confidence in such lifting e.g. electric hedge clippers. This is, of course, quite a heavy form of gardening which would not be engaged in by every middle-aged female. In cross-examination she said that she did try to carry heavier bags but that if anything was really heavy she would lack confidence in carrying it and could not do so for any distance. It can be seen therefore that not only is her continuing complaint a subjective one, which may pass with time and the reassurance that her wrist has physically recovered, but also that it does not cause any substantial loss of amenity to her.

[36] Both counsel referred to the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (4th Edition). There was some debate as to whether this should be viewed as a wrist injury or a hand injury. There was some debate as to whether she was at the top of a minor category or the bottom of the next category up. There was some debate as to whether the scarring should be separately valued and, if so, how significant it was.

[37] It is my duty to award the plaintiff fair and reasonable compensation. I should look at the award overall to see that it achieves that objective. While bearing in mind the advice given in the relevant section of the guidelines for scarring to a female, it is clear that a single figure for general damages should be decided on by the court, taking into account both her initial difficulties in the first year, her continued sincere but subjective complaints and the undoubted scarring. Taking these factors together I conclude that an award of general damages of £25,000 is appropriate. To that shall be added the special damages figures of £1,944 with interest on those at 2% and on the general damages at 6%, from the date of the writ. The Defendant shall discharge the CRU of £3,767.55.