Neutral Citation No.: [2009] NIQB 7 | *Ref:* **McCL7387**

Judgment: approved by the Court for handing down | *Delivered:* **22/01/09**
*(subject to editorial corrections)**

2002 No. 002699

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

FRANCIS JOHN McADAM

Plaintiff

-and-

ROY GRAHAM,
BRIAN KEYES TRACTORS LIMITED
AND
STEPHEN GRAHAM

Defendants

_____

HEADNOTE

Claim for personal injuries – employers liability – submission of no case to answer – governing principles – admission of evidence – over-riding objective – Rules of the Supreme Court (NI) 1980 – Order 1, Rule 1A – Order 38, Rule 3.

McCLOSKEY J

[1] This is the ruling of the court in response to the Defendants' application for a direction of no case to answer.

[2] This action has proceeded against the first-named and third-named Defendants only. On the first day of trial, by consent of the parties, judgment was entered for the second-named Defendant against the Plaintiff, with no order as to costs.

[3] The Plaintiff's date of birth is 8th November 1979 and he is now, therefore, aged twenty-nine years. The case outlined to the court at the outset of the trial by Mr. Hill QC, appearing (with Mr. Barr) on behalf of the Plaintiff, was that on 10th July 2000, in the course of his employment as a farm labourer, he sustained serious injuries. The Plaintiff's case is that he was employed by the first-named Defendant and that, on the accident date, he was working on a farm at Boho, County Fermanagh (Mr. Irwin's farm), pursuant to the directions of the first-named Defendant. His duties entailed the driving of a tractor, to which a slurry tanker was attached. The Plaintiff was engaged in applying the slurry to various fields. At approximately 6.30pm, while driving along a narrow country road, there was a loss of control of the steering of the tractor, causing the vehicle to veer to the left. The Plaintiff attempted to remedy this, by steering to the right, to no avail. The tractor struck a ditch on the left hand side of the road, then turned towards the right hand side, striking the ditch on that side, causing the Plaintiff to be ejected from the cabin. In the process, the slurry tank "jack-knifed". In its terminal position, the tractor was angled "nose down" towards the adjacent field. This outline reflected the essence of the account subsequently given by the Plaintiff in evidence.

[4] The Plaintiff's case is that the accident occurred on account of a faulty tractor tyre. In evidence, the Plaintiff made the following case:

(a) When he arrived at the first-named Defendant's farm on the morning of the accident, he observed that the front left hand (i.e. nearside) tyre of the tractor was soft.

(b) He informed the first-named Defendant accordingly.

(c) The first-named Defendant directed him to drive to the garage of his brother William, who carried on a car dealing business a mere fifty yards away, to re-inflate the tyre.

(d) The Plaintiff did so and then reversed the tractor to the farmyard.

(e) The Plaintiff then spoke again to the first-named Defendant, who replied, in terms, that the tyre "*… will be OK … will do you today*".

(f) By lunchtime, the tyre had become soft again and the Plaintiff inflated it with a portable pump, supplied by Mr. Irwin, owner of the farm where the slurry spreading was taking place.

(g) When the accident occurred, the Plaintiff was transporting his last load of slurry, a full tanker, to a particular field.

These were the key allegations made in evidence by the Plaintiff with regard to the under-inflated tyre. The Plaintiff was unable to give any evidence about the condition of the offending tyre either in the immediate aftermath of the accident or subsequently. No evidence about these matters was provided to the court by any witness.

[5] At this stage of the trial, the Plaintiff's case is closed, evidence having been given by the Plaintiff and Mr. McGlinchey, a consulting engineer. The court has also received a substantial quantity of agreed documentary evidence. On behalf of the first-named Defendant, Mr. Elliott QC (appearing with Mr. David Dunlop) submits, in terms, that the Plaintiff's case is so unworthy of belief that it qualifies to be dismissed at this stage. Mr. Colton QC and Mr. Gormley, representing the third-named Defendant, have adopted this submission.

[6] The parties are agreed that, in determining this application, the court should have regard to the totality of the evidence adduced thus far. This is not confined to the matters particularly highlighted in the submissions made. The court is enjoined to reflect scrupulously on the veracity and reliability of the Plaintiff's case. Bearing this in mind, I consider that those aspects of the Plaintiff's case which give rise to particular concern are the following:

(a) While the Plaintiff steadfastly maintained that he was at no time a self-employed person, he could offer no explanation for not possessing an employed person's "insurance card". This, he acknowledged, was inexplicable.

(b) He admitted to having been guilty of dishonesty, giving rise to a criminal conviction for the theft of an agricultural vehicle.

(c) He testified not once, but twice, that his back had given him no problems prior to the accident. This was belied by an entry in a general practitioner's record, dated 17th May 1999, to the effect "*Advised by OT to see Dr the specialist re back problem longstanding … pain … right leg …* ". When confronted with this record, the Plaintiff promptly retracted his twofold denial, advanced by him in uncompromising terms just moments previously, claiming that this had "*slipped* [his] *memory*".

(d) In examination-in-chief, the Plaintiff asserted that his post-accident back problems were such that he had to be admitted to hospital for a "*curvature of the spine*" procedure on 16th November 2000; that physiotherapy was required; that he was unable to sit or stand for long periods; that severe back pain continued into 2001, sometimes on a

daily basis; and that his back symptoms extended into 2002 and 2003, rendering him unfit for farm labouring. These claims are difficult to reconcile with the records of the Erne Hospital. According to the hospital records, the Plaintiff complained of pain in the lower lumbar region on 11th July and 17th July 2000. However, on four successive hospital review dates – 29th July, 8th August, 17th August and 23rd August 2000 – the records make no mention of any back problem. It must be observed that these are impressively detailed records, particularly those compiled by Dr. Marshall. Moreover, there is nothing in the extensive record of 16th November 2000 documenting any medical procedure relating to the Plaintiff's back.

(e) In summary, the Erne Hospital records for the year 2000 do not support the Plaintiff's unequivocal claim in evidence that his back was painful throughout this period, to the extent that, of all his injuries, it constituted (in his words) his "*main problem*".

(f) The Plaintiff testified that following a period of some occasional work (which he did not date) he secured steady employment, apparently as a farm labourer, with one Gary Hetherington, beginning in June 2003 and continuing until 2005, with wages of £250 per week. The Plaintiff stated in evidence, without hesitation, that his statutory benefits were "*stopped*" when he began this work. This is contradicted by the Social Security Agency Certificate, which records that the Plaintiff was in receipt of Income Support of £149.60 per week from 11th April to 2nd October 2003 and, subsequently, at varying rates of between £102.35 and £185.74 per week *until 31st January 2005.* The total of these payments is in excess of £12,000. The Plaintiff made no attempt to explain or justify his patently untruthful initial evidence about this matter.

(g) The Plaintiff agreed that he was not entitled to receive Income Support throughout the period June 2003 to January 2005 and acknowledged that he had claimed, and received, this benefit dishonestly.

(h) The Plaintiff gave evidence that he spoke to the first-named Defendant in hospital, some hours following the accident. According to the Plaintiff, he suggested to the first-named Defendant that the cause of the accident had been a problem with the steering. He said nothing about a soft tyre or a deflated tyre. Having regard to the case made by the Plaintiff, in particular those aspects detailed in paragraph [4] above, this omission is of unmistakable significance.

(i) The Plaintiff claimed that throughout the whole of the working day, on 10th July 2000, he was able to drive the tractor without difficulty. In contrast, the evidence of the Plaintiff's consulting engineer, Mr.

McGlinchey, was that if there had been a leakage of air from the offending tyre, the resultant "drag", causing the steering to "tug" the vehicle to the left, would have become progressively more noticeable. This is significant, given that, on the Plaintiff's own evidence, he must have been driving the tractor during the greater part of a period of around nine hours immediately before the accident.

(j) Mr. McGlinchey acknowledged that, on the hypothesis advanced by the Plaintiff, a sharp "tug" of the tractor to the left would not be expected. [The words "sharp tug" were the Plaintiff's, in examination-in-chief. In cross-examination he described a sudden "pull"].

(k) The Plaintiff did not see fit to periodically check the condition of the offending tyre, as the day progressed. This does not lie easily with the impression, which the Plaintiff clearly sought to create in his evidence, that this was a source of significant concern to him from the beginning of the day.

(l) The Plaintiff's belated claim, following completion of both cross-examination and re-examination, that he had "*felt*" the soft tyre at around or close to lunchtime on the accident date is difficult to accept, having regard to its timing and his failure to avail of ample earlier opportunities to mention this matter of unquestionable importance.

(m) The report of Mr. Farrell, an inspector employed by the Health and Safety Executive (NI), documents that on 5th September 2000 he interviewed the Plaintiff. The report records, *inter alia*:

> "*McAdam, on being questioned, claims he was travelling at normal slow tractor speed (around 12-15 mph) and that he felt a pull to the left on the steering from which there was no response. He further claims that the nearside front tractor tyre was worn on the outside*".

In evidence, the Plaintiff accepted, without reservation, that this was what he had told Mr. Farrell. When asked (by the court) what the description "*worn*" was intended to convey, the Plaintiff testified that the outside of the tyre was bald, to be contrasted with the inside, which had "*grip*". On the face of the report, the Plaintiff made no mention to Mr. Farrell of the events at the two farms or the garage during the course of the day in question, as alleged by him in evidence. Nor did he suggest, even obliquely, a soft or under-inflated tyre. When juxtaposed with the case now made, these omissions are, in my view, startling.

(n) The Plaintiff was examined by Mr. Yeates, FRCS, a consultant orthopaedic surgeon, on 12th February 2004. According to this report, the Plaintiff "*states that the steering and brakes failed*". It was not disputed by the Plaintiff that he gave this history. The Plaintiff testified, in terms, that this was his belief about the cause of the accident for several years thereafter. When did he first attribute blame to an under-inflated tyre? His answer was: When he first learned of "*the engineer's views*". Elaborating, he explained that this was a reference to his consulting engineer's opinion, which was that there was (in the Plaintiff's words) "*absolutely nothing wrong with the vehicle*" – which, in turn, prompted the Plaintiff (he claimed) to reflect on some other explanation for the accident. The difficulty with this claim is the evidence which establishes that the Plaintiff was present *during* Mr. McGlinchey's inspection of both the tractor and the accident locus and the entry in Mr. McGlinchey's report:

> "*The Plaintiff stated that when he arrived for work that the tractor had a flat front left hand wheel and that he was told to go and get it blown up at a garage about one hundred yards away. Later in the day it was fairly flat again and … a pump … was then used to inflate the tyre again … there was only a vague idea as to what pressure was involved.*"

This, in my view, confounds the Plaintiff's claim, repeated in his evidence, as set out immediately above.

(o) In his evidence, the Plaintiff stated, without qualification, that at lunchtime on the day of his accident, at Irwin's farm, he re-inflated the offending tyre to a pressure of 33 lbs. This is irreconcilable with what he told Mr. McGlinchey, during the inspection on 13th February 2004:

> "*Plaintiff stated that …*
>
> *This pump had no pressure gauge, so there was only a vague idea as to what pressure was involved*".

(p) The Plaintiff also asserted to Mr. McGlinchey that the Defendant "… *changed the relevant tyre two days after the accident*". This may be contrasted with the Plaintiff's evidence, which described no such event on the second day following the accident. Rather, the Plaintiff gave a description of something quite different, consisting of his observation, on 22nd or 23rd July 2000 (i.e. almost two weeks post-accident), of a worn tractor tyre in a trailer attached to the first-named Defendant's vehicle.

(q) There is a readily understandable alternative explanation for the Plaintiff's accident, constituted by a combination of the narrowness of the road, the soft grass verge to the vehicle's nearside and some momentary inadvertence on the part of the Plaintiff at the end of a long day's work.

[7] Bearing in mind the Plaintiff's evidence, unequivocally given and repeated, that he first developed the "under-inflated tyre theory" some years following the accident, when engineering evidence established (in his words) that "*… there was absolutely nothing wrong with the vehicle*", some reflection on the Plaintiff's pleadings, formulated on various dates, is appropriate. Mr. McGlinchey's report records that his inspections of the tractor and the accident locus were conducted on 13th February 2004, while his report is dated 3rd June 2004. In the original Statement of Claim, served on *27th February 2003*, the principal allegations made were that the tractor had an unsuitable clutch, unsuitable steering and "*a defective tyre*". The alleged defect in the tyre was not particularised and these allegations were merely repeated, without elaboration or particularisation, when the Plaintiff supplied further particulars of his case on *24th July 2003:* this notwithstanding an impressively detailed request for further particulars. Much later, on *1st May 2008*, the Plaintiff's solicitors served an amended Statement of Claim, which contained no allegation about an under-inflated or soft tyre or any pre-accident reporting of this defect by the Plaintiff to the first-named Defendant. On *21st October 2008,* the third-named Defendant served a Notice, seeking further particulars of the defects alleged. The Plaintiff's reply, dated *3rd November 2008,* is noteworthy:

> "*The defect was a bald tyre. In addition there was a puncture in the said tyre. In relation to that puncture, the Plaintiff used a PTO pump to blow up the said tyre*".

For whatever reason, the *first* defect alleged in this pleading was a bald tyre and the *second* was a punctured tyre. Having regard to the Plaintiff's evidence about the significance of the engineering evidence (which predated this pleading by over two years), the content of this pleading is inexplicable. Furthermore, in the same pleading, the Plaintiff made the following case:

(a) On the date of the accident, he reported both the bald tyre and the puncture to the first-named Defendant. *At the trial, no evidence was led about the first of these alleged reports*.

(b) On the date of the accident, there was defective clutch which did not function properly: *ditto*.

(c) Following the accident, the Plaintiff reported a defective clutch to the first-named Defendant: *ditto.*

(d) Defective steering, causing the tractor to pull to the left on the date of the accident, was reported by the Plaintiff to the first-named Defendant prior to that date: *ditto*.

[8] I am disposed to make some allowance for the consideration that, in this jurisdiction, the culture of pleadings sometimes inclines towards allegations couched in cautious, general and occasionally evasive, rather than detailed and comprehensive, terms. However, in the present case, this does not explain the discrepancies highlighted immediately above. It is clear that not insubstantial care and effort were invested in the preparation of the Plaintiff's pleadings, at the various stages when they were brought into existence. It is equally clear that those aspects of the pleadings highlighted above can only have been formulated on the basis of the Plaintiff's instructions. In matters of content, omission and timing the court is inevitably left with a sense of unease, which is compounded by the litany set out in paragraph [6] above.

[9] Paragraph [6] of this ruling lists a veritable catalogue of uncertainties, discrepancies, inconsistencies and contradictions in the case made by the Plaintiff. In some of these matters, the Plaintiff admitted that he had lied under oath. I am satisfied that none of these admissions was volunteered. Rather, the skilful and penetrating cross-examination of Mr. Elliott QC left the Plaintiff with no choice. The Plaintiff might have gained some redemption if he had spontaneously and voluntarily retracted, modified or clarified some of his earlier replies: however, he did not do so. I make appropriate allowance for the Plaintiff's apparent educational and social background, the unfamiliar and sometimes uncomfortable nature of the courtroom ambience and the elapse of time since the accident (one of the regrettable features of this litigation). I also take into account that there can be imperfections and frailties in the evidence of a truthful witness. However, given the matters detailed in paragraph [6] above, I consider that, the Plaintiff, in seeking to persuade the court that he is a witness worthy of belief in the essential aspects of his case, confronts an insurmountable obstacle. The conclusion that the veracity and reliability of the Plaintiff's evidence have been comprehensively and irredeemably undermined is inescapable.

[10] In deciding whether to accede to the Defendant's application, I remind myself that the evidence at this stage "*… must be viewed in the light most favourable to the Plaintiff*": per Lowry LCJ in ***McIlveen –v- Charlesworth Developments*** [1973] NI 216, p. 219. In ***Lowry –v- Buchanan*** [1982] NI 243, a trial in which the Plaintiff's case was withdrawn from the jury, Lowry LCJ stated, at p. 244:

> "*In any action founded on negligence a stage is reached when the trial judge has to consider whether the case should be left to the jury. Sometimes the answer to this question is a formality. Other times the question arises in one or both of two ways: the Plaintiff's proof may lack a vital ingredient,* ***or the trial judge may***

> ***conclude that no jury properly directed as to the law could reasonably find for the Plaintiff.***"

[Emphasis added].

In ***Graham –v- Burns*** [1978] 3 NIJB, Gibson LJ observed, at p. 8:

> "*It is not justifiable for a trial judge on an application to withdraw the case from the jury to refuse the application in reliance on a scrap picked out of the evidence, and perhaps out of context, which is obviously opposed to every other part of the record including the repeated and considered statements of the witness who made the statement relied on*".

In ***O'Neill –v- Department of Health and Social Services*** [1986] NI 290, Carswell J formulated the governing test succinctly [at p. 292A]:

> "*The issue at this stage of the case is whether there is any evidence upon which a reasonable jury, consisting of persons of ordinary reason and firmness, could if properly directed find in favour of the Plaintiff*".

[11] It is my task to apply the tests and principles rehearsed above to the evidential matrix presently before the court. I do so taking into account that there are certain aspects of the Plaintiff's evidence which were either not challenged or not significantly undermined. I have also had regard to Mr. Hill's submission regarding an oft overlooked provision of the Health and Safety at Work (Northern Ireland) Order 1978, Article 38, which provides:

> "*(1) Where an entry is required by any of the relevant statutory provisions to be made in any register or other record, the entry if made shall, as against the person by or on whose behalf it was made, be admissible as evidence.*
>
> *(2) Where an entry which is so required to be so made with respect to the observance of any of the relevant statutory provisions has not been made, that fact shall be admissible as evidence*".

Mr. Hill relied on Article 38(2). Furthermore, I make the allowances specified in paragraph [9] above. Having reflected carefully on the content of the Plaintiff's sworn testimony, the manner in which he gave his evidence, the sequence in which his evidence was given and his demeanour, I find that he was an unimpressive, evasive and untruthful witness, who has told certain untruths and has indulged in fabrication and exaggeration. I consider that the essential fabric of the Plaintiff's case has been undermined to the extent that it has disintegrated, irreparably. I conclude that the Defendants' application is well founded and I rule, accordingly, that neither of the remaining Defendants has a case to answer.

Disposal and Costs

[12] It follows that the Defendants shall have judgment against the Plaintiff. Following delivery of this judgment, the court was informed that all three parties are legally assisted. Having considered the submissions of counsel, I rule that costs should follow the event and I make the following costs orders:

(a) The Defendants shall recover their costs from the Plaintiff, such order not to be enforced without further order of the court.

(b) An order for taxation of the Defendants' costs as legally assisted persons.

(c) An order for taxation of the Plaintiff's costs as a legally assisted person.

[13] Finally, I record my gratitude to counsel for their compact and focussed submissions. Furthermore, I commend the parties' representatives for the responsible and flexible endeavours which ensured that the court received a substantial quantity of agreed documentary evidence at the outset and during the course of the trial. This shortened the trial and costs were saved in consequence. In contemporary litigation, the increasing resort to the court's wide powers under Order 38, Rule 3 of the Rules of the Supreme Court (NI) 1980 is demonstrably harmonious with the over-riding objective enshrined in Order 1, Rule 1A and the various public interests in play.