Neutral Citation No [2012] NIQB 9 | *Ref:* **GIL8427**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **28/02/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

ANTHONY KANE

Plaintiff;

-and-

HARLAND AND WOLFF PLC, TECH STAFF MANAGEMENT SUPPORT LIMITED (IN LIQUIDATION)
AND ORION ENGINEERING SERVICES LIMITED

Defendants.

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GILLEN J

Introduction

[1] In this action the sole matter to be determined by me is that of quantum. Liability is not in issue and the parties have agreed that judgment should be entered against all three defendants.

[2] On 10 September 2001 the plaintiff, whose date of birth is 10 January 1957, was working in a fabrication shed at Harland Wolff as a plater when a bulkhead collided with and trapped his right arm causing him to sustain a crush injury.

General Damages

[3] Both parties had provided medical reports. The plaintiff relied on four reports from Mr Buchanan, Consultant Orthopaedic Surgeon and one report from Dr Morgan, Consultant Psychiatrist. The defendants relied on three reports from Mr Wallace, Consultant Orthopaedic Surgeon and a report from Dr Morrow, a Consultant Neurologist. Helpfully the parties have also supplied me with a joint medical report of 19 October 2011 from Mr Buchanan and Mr Wallace. No medical witness was called to give evidence before me.

[4] The plaintiff also gave evidence about his injuries consistent with the medical reports. In addition he told me that the injuries prevented him pursuing his hobby of sea fishing although he has now tried fly fishing. His ability to carry out gardening and home decoration has been adversely affected.

[5] The plaintiff in the aftermath of his injury to his right forearm required microsurgery to replace the soft tissue and the application of a plaster of paris splint. He had suffered an almost complete division of brachio radialis and a partial division of brachialis. He required prolonged physiotherapy. This must have been an extremely painful injury in the early stages.

[6] He has now regained reasonable right elbow function with slight loss of full extension but good flexion and normal rotational forearm movement.

[7] However his forearms fatigue quickly with any moderate exertion and using hand tools is uncomfortable although not impossible.

[8] It was agreed by the consultants that he could cope with a light job but would probably prefer not to have to perform repetitive activities with his right upper limb involving lifting and carrying. He could cope with a light driving job but could not manage any heavy physical work. Hence I concluded that he could not return to being a plater which does involve heavy lifting especially where his arms are involved e.g. in the use of oxyacetylene burners and electric arc welding, etc notwithstanding the advent of modern tool making assistance.

[9] In the future matters will remain much as they are now. It is unlikely he will develop osteo arthritis as a result of his injury.

[10] I viewed the scarring on his arm which is readily visible and extensive on the inside of the arm.

[11] In addition Dr Morgan's report of 18 August 2003 recorded that at the time of the accident he thought he might be killed and that his arm would be amputated. He had initial symptoms of pain, anxiety, agitation and an acute stress reaction. Thereafter he had intrusive memories of the accident with dreams about it and overall hyper vigilance and irritability symptoms typical of a post traumatic stress disorder. Two years after the accident these symptoms had cleared up completely.

[12] Taking all these matters into account I consider that £50,000 is the appropriate figure for general damages. To this will be added 2% interest from the date of the writ less a period of 2 years (see below).

Past and Future Loss

[13] This was a vexed area. It was clear that this man could not be employed as a plater again. He gave evidence before me and I was satisfied that he was an honest, genuine, hardworking man who had a good working record over the years and now will be confined to lighter work.

[14] The evidence of the plaintiff and of Mr Sullivan, a director with Tesmonard Europe Limited (TEL) an engineering recruiting specialist firm who knew the plaintiff since they had served an apprenticeship about the same time and who was aware of the reputation he enjoyed, satisfied me that this was a man whose skills were likely to be in demand as a plater.

[15] I also had before me evidence from ASM accountants on behalf of the plaintiff and from Harbinson Mulholland on behalf of the defendant.

Retirement age

[16] Salient issues in the case were as follows. First, retirement age. Mr Simpson QC, who appeared on behalf of the defendant with Mr McMahon, contended that men engaged in such heavy work often retire much before 65 i.e. in the early 60s.

[17] In the case of the plaintiff I am satisfied that the probabilities are this man would have worked until he was 65 because:-

- I was very impressed by him as a hardworking man. The past is often a good template for the future and relying on that I was satisfied he was not someone who would take easily to early retirement.
- Mr Sullivan was aware of platers in his area of work who continue until 65 and indeed beyond.
- Increasingly younger men are not coming into the trade because of the reduction in work and older men with the appropriate skills are now more in demand than hitherto had been the case.

Epilepsy

[18] Dr Morrow records this plaintiff had a history of meningitis and he had some intermittent epileptic seizures felt to be tonic clonic seizures. His last two seizures were in 1994 and 2005 respectively. The latter had no clear precipitant. There is no evidence of any on going activity.

[19] It was Dr Morrow's view that whilst the person with active and on going epileptic seizures will be ineligible to drive and should be advised not to work at heights or with moving machinery, given that this man has not been on any medication and has had no seizures since 2005, any restriction in his activities and employability are now gone. In short such restrictions would only exist for approximately 12 months following the most recent seizure. Given therefore that Mr Kane has regained his driving licence and there is no mention of any further seizures, Dr Morrow felt that at the present time there was no employability restrictions upon him because of this mild tendency to epileptic seizures which is now treated.

[20] Mr Sullivan concurred and indicated that if he had been told that this man had an epileptic tendency provided that he was given the kind of clean bill of health as that suggested by Dr Morrow, there would be no impediment to his employment.

[21] Excessive drinking can be a precipitant of epilepsy but I was not persuaded by the evidence from his medical records that his drinking habits were sufficiently troubling to raise this possibility.

[22] Hence I have taken the view that the issue of epilepsy is not relevant to this man's potential future working career.

Promotion

[23] Mr Stitt raised the possibility of the plaintiff being promoted to the position of foreman had it not been for the accident. Mr Sullivan's evidence was that in his experience he had only seen six foremen appointed in 12 years. In my view the possibility of this man having been appointed a foreman is too remote and therefore I have not taken it into account.

Agreed Past and future loss

[24] Loss to date of trial/actual earnings/loss of services and sundry/future loss/residual earnings/future loss of services and sundry have all been addressed by the two firms of accountants. Helpfully their approaches have been drawn up by way of a Scott schedule and accordingly a number of matters no longer need to be addressed by me because they have met with a common approach.

[25] The parties have agreed:-

- The actual earnings that the plaintiff has achieved to date are £94,850.
- Loss of services and sundry to date are £9,000.
- Residual earnings on a basis of the plaintiff working to 65 with a multiplicand of 6.89 achieve a figure of £17,152.
- Loss of future services and sundry amount to £9,000.

Past and future loss to be determined

[26] This left outstanding the following issues:

(a) What earnings he would have achieved without the accident to date.

(b) Future loss of earnings without the accident on an agreed multiplier of 6.89. Future residual earnings on an agreed multiplicand of £17,152 and a multiplier of 6.89.

[27] In essence the plaintiff's case which set the foundation of his claim for loss of past earnings and future earnings was predicated on him working for TEL or a similar employer such as Continental as and from 10 September 2001.

[28] The plaintiff asserted four possible scenarios and calculated figures through the accountants on each one. The four scenarios were:

- That he would have been deployed e.g. in Holland on a Dutch contract earning an income equating to the earnings of the top 10% of employees engaged in that Dutch contract. This would have required him to work and live in Holland during the time he was so employed.

- Deployed on the United Kingdom wind farm contract for TEL and earning an income equating to the earnings of those employees engaged for more than 6 months on the contract.

- Deployed on the United Kingdom wind farm contract for a period of 28 weeks and for 12 weeks thereafter on the Dutch contract.

- Deployed on the United Kingdom wind farm contract earning an income equating to those sub contractors who were engaged for more than 9 months on the contract.

[29] I have dismissed scenario 4. Very honestly Mr Kane conceded that it was unlikely that he would ever have taken on the job as a self employed contractor simply because of the paper work involved. This was also the experience of Mr Sullivan who indicated that his experience was that many men did not want the bother and inconvenience of filling in all the forms necessary to be treated as self employed.

[30] Mr Kane asserted that had it not been for the accident he would have availed of the work opportunities with TEL in Holland. It was his evidence that his brother was a director in TEL and this would have helped with him getting a job there. Mr Sullivan had offered him a job in 1999/2000 and indeed his brother had also asked him to work in Holland.

[31] The plaintiff claimed that at that stage he had not accepted the offer of working in Holland with TEL because Holland was not particularly to his liking. It was away from home, he would rather be where "people speak English", in the summertime he found it very hot and the insects were disturbing and also he was somewhat concerned about working with Turkish immigrants. He had no problems however working in places such as Belfast, Scotland, Barrow etc.

[32] I have come to the conclusion that it is unlikely that the plaintiff would have worked full time for TEL had the accident not happened on anything other than a fairly irregular basis for the following reasons:

[33] The solicitor acting for the plaintiff originally had been in Newcastle upon Tyne. Proceedings had been issued in the Newcastle upon Tyne County Court. In a

schedule of special damage which emerged in those early proceedings, when he was asked about loss of earnings, the pleading on his behalf in reply had alleged:

> "Following the accident, his contract with Tech Staff was terminated. It is the claimant's case that but for the accident he would have remained working in the same capacity for up 2 years. Thereafter if work was not available at Harland and Wolff he would have resumed employment as a plater for different employers at a similar rate of pay".

[34] The damaging aspect of this reply is that it made not the slightest reference to TEL, any other named firm e.g. Continental or the substantial earnings which allegedly he could have earned with TEL.

[35] The absence of TEL or any other named firm as a factor in this case continued in the current proceedings. In the course of a reply to particulars dated 9 July 2009 answering a request for full particulars of any wage increases he would have been entitled to the plaintiff replied as follows:

> "Such wage increases that would have been enjoyed by the plaintiff should he have remained in the employment of the second defendant or have been employed by any of the other defendants or a comparable employer in his former occupation as a plater. In the absence of discovery of contemporary earnings of a comparable employee the plaintiff is unable at the time hereof to quantify in precise terms his entitlement to remuneration increase to which he lays claim".

[36] Again there is not the slightest hint here of the possibility of working with TEL or any other named firm e.g. Continental etc.

[37] A letter from TEL penned by Mr Sullivan of 28 January 2010 referred to Mr Sullivan and his firm having "tried on many occasions to employ him". That did not accord with the evidence from both the plaintiff and Mr Sullivan to the effect that the plaintiff was at most asked two or three times if he wanted employment with TEL. On each occasion in any event he had refused and the reason seemed to be that he did not like working away from home. I strongly suspect that as the plaintiff got older his inclination to work away from home off shore, in Holland or even on the wind farm turbines just off the coast of England (which I referred to in scenario 2 and 3) would have become less and less.

[38] I consider that this is the most likely reason for the absence of any reference to TEL or any other named firm in the earlier pleadings notwithstanding that TEL had provided a letter on his behalf to his solicitors in Newcastle upon Tyne in March 2004 as well as the letter of January 2010. The truth of the matter is that I do not think the plaintiff had any great inclination to work for TEL either off shore or in Holland. That

is why it did not feature with sufficient strength to have persuaded either firm of solicitors either in Newcastle upon Tyne or in Belfast to have included any reference to TEL in their replies to particulars. If he really had been urging this matter, it clearly would have emerged. I am satisfied that with the gathering momentum of late middle age this man would have sought the reassuring stability of continuity of lifestyle closer to home. It is a commodity perhaps not so valued by those who are younger but I am sure it would have provided a key component in this plaintiff's choice of work.

[39] The defendants' approach to this matter had been to value the plaintiff's past loss and future loss based on the actual total gross earnings of the plaintiff prior to his accident adjusted for inflation. It was argued that that was the only prudent approach given the uncertainty surrounding the plaintiff's pre accident work pattern which did include spells working in Belfast, Barrow, Scotland and indeed Holland from time to time.

[40] On the other hand I do not think that the pre accident pattern, which largely involved him working in England, albeit with some spells outside, would necessarily have been replicated in the future. It did not take into account the sad reduction in the shipbuilding industry and ancillary kind of work in the North East of England and elsewhere over the last 10 years with for example the closure of Swann Hunter which was a major employer for platers. Several of the other firms for whom the plaintiff had worked have either reduced their capacity or also closed down. I do not think this man was the type of person who would have allowed himself to remain unemployed for lengthy periods. Therefore I believe he would have swallowed the difficult pill and perhaps sparingly taken up work with TEL whether it was off shore or in Holland for at least some of the time, as well as looking for work closer to home, if it would have prevented him being unemployed for lengthy periods.

[41] Doing the best I can, in a very uncertain area, I have come to the conclusion that this man probably would have continued his similar pre accident pattern for perhaps two thirds of the time and have been prepared to take on the work with TEL, or Continental who had also offered work, which he did not like to do perhaps one third of the time. I see no reason why that would not have included the larger wages with the wind turbines which were included in scenario 3. Although I consider that spending 1/3 of his time with TEL would probably have been at the very top end of what was likely, particularly as the years passed, I have decided that the appropriate figure for total financial loss, before interest, is £257,114 (being the calculation of 1/3 the ASM approach on scenario 3 and 2/3 the HM approach on the conventional pre-accident salary approach). I am assured by counsel that these figures include all the ancillary matters pleaded in the amended statement of claim e.g. care, transport etc. The total of £257,114 is made of loss to date of £169,347 (including £9,000 of services and sundry) and a total future loss of £87,767(including £9,000 of loss of services and sundry). Together with the general damages this makes a total award of £307,114 plus interest. From that will be deducted the figure already paid by way of interim payment .

Effect of delay on time to and from which interest runs

[42] Delay by a plaintiff may affect the time from, or the time to, which interest runs. Interest may be cut down either at the beginning or at the end of the period of accrual of cause of action to judgment. The authorities would seem to suggest that the commonest approach is not to have any specified period from one point in time to another but simply to take the interest for the years from accrual up to cause of action to judgment and then to disallow the interest for a number of these years. (See McGregor on Damages 18th Edition at paragraph 15-101).

[43] By reason of the discretionary nature of the trial court's decision to reduce interest, there appear to be no general rules as to the degree of reduction in particular cases. However, McGregor indicates that at the date of the latest edition the minimum number of years between cause of action and judgment that has brought intervention has been seven. (See Hamilton-Jones v. David and Snape [2004] 1 WLR 924). Around nine years apparently quite commonly leads to reduction. (See Fairhurst v. St Helen's and Knowsley Health Authority [1995] PIQRQ1).

[44] In this case the delay between the date of the accident and the date of this hearing has been over 10 years and the date between the issue of the writ and the date of this hearing has been over 7 years.

[45] I consider that there has been unacceptable delay in this case being processed and brought on for hearing and that therefore it would be inequitable to award the full conventional amount of interest on either the general damages or the special damage awards. Helpfully the accountants have calculated figures for interest on a full basis. I intend to disallow 2 years of the interest calculated by the accountants and 2 years also on the conventional method of adding interest to the general damages. If there is any difficulty calculating the interest therefore accrued, the matter can be referred back to me.

[46] To the total damages therefore I will add the interest which the parties can calculate with a reduction of 2 years loss of interest to reflect the delay in the proceedings being processed.