Neutral Citation No. [2012] NIQB 114 | *Ref:* **GIL8660**

Judgment: approved by the Court for handing down | *Delivered:* **05/12/2012**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

DONALD McELHATTON

Plaintiff;

-and-

IAN McFARLAND
and
LORRAINE McFARLAND

Defendants.

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GILLEN J

[1] In this matter the plaintiff seeks damages against the defendants arising out of an accident he sustained whilst carrying out work to the roof and guttering of the home of the defendants on 16 May 2006.

[2] It was common case that the plaintiff had volunteered at the request of the defendants to carry out this work. It is also common case that in the course of the work being carried out by the plaintiff, he was working from an unfooted and unsecured ladder which slipped when he was stretching to reach part of the gutter causing him to attempt to jump clear. As a result he sustained inter alia a displaced comminuted intra articular fracture of the right distils tibia and an associated fracture of the fibular neck. Helpfully counsel has agreed that damages in the case, without prejudice to the issue of liability, could be valued at £30,000.

[3] In the course of the hearing Mr McNulty QC, who appeared on behalf of the plaintiff with Mr McDonnell indicated that there was clearly no contractual situation and in the circumstances no breach of statutory duty would arise. The plaintiff's case was based purely on the common law duty of care which counsel alleged was owed by the defendants to the plaintiff.

[4] Finally, it was beyond plausible dispute that this ladder ought to have been footed or secured in some manner and that this was the cause of the accident.

The plaintiff's case

[5] The plaintiff in evidence before me made the following points:

- Mrs McFarland had asked him to clear the moss from her roof and the guttering approximately two weeks before the accident.

- Approximately two days before the accident he had again spoken to her at her house where she had pointed out to him what needed to be done. He alleged that he told her he would come to her house in the morning of a particular day shortly thereafter to do the work.

- On the morning of 16 May 2006 he went to the house of the defendants to carry out the work. There he met Mr McFarland coming out of the house and other than to say good morning to him there was no conversation. He assumed Mrs McFarland was in the house because her vehicle was still there.

- The plaintiff produced a ladder off his trailer and put this up against the roof. (The access ladder). He also had a roof ladder once he had gained access to the roof itself.

- He presumed that there would be someone there in case he needed help. Whilst originally he told me he saw her there in the morning, he later said that he did not see Mrs McFarland but noticed her car was there at one stage and at a subsequent stage it had been moved.

- Within three hours the accident occurred. By that time he had been up the access ladder and onto the roof ladder on about three or four occasions. He had moved the access ladder about four times as he moved along the exterior of the roof area. Each time he placed the ladder in position, and ascended.

- Shortly before the accident it started to rain. He was reaching over to get some moss from a gutter when the ladder just "shot out".

[6] The plaintiff informed me that he had worked for forty years or thereabouts as a labourer carrying out block work (33 years in England) but he had never footed a ladder when ascending a ladder and he had never been told to do so.

[7] The plaintiff claimed that Mrs McFarland came to visit him in hospital about 2 or 3 days after the accident but there was no discussion about who was to blame. When she told him she was sorry that it had happened he said "These things do happen". He alleged that she told him that when he got out he should come and see

her because she had insurance on her property, that he was welcome to look at the insurance documents and take them to a solicitor. I pause to observe that in so far as this is true it did not amount to an admission of liability.

[8] In cross-examination by Mr Ringland QC who appeared on behalf of the defendants with Mr Matthews, the following points emerged:

- There was no discussion with the defendants as to how the job would be done. The plaintiff accepted that this was a matter for him.

- He had a long history working in the building trade although he claimed he had never worked on a roof before – a fact which I found wholly implausible given the forty years experience in the building trade.

- The plaintiff claimed that it never came up in the conversation with the defendants that he was experienced in the building trade.

- He would not have expected the defendants to discuss with him how he was going to do the job.

- In all his years in the building trade he had never recalled anyone holding or footing a ladder that he had ascended – again a matter which I found rather hard to believe.

- The plaintiff agreed that he would not have asked someone to hold the ladder at the start of his work because the roof was not very high. He said it would have been "nice to have help" and later added that he would have asked for help if it had been there. However he later admitted that during the three hours that he was working there he did not feel he required any help. This apparent contradiction in his evidence was characteristic of the tenor of the evidence that he gave before me.

[9] At the commencement of the trial I had admitted a statement of Mrs McFarland under the terms of the Civil Evidence Order 1997 Article 3 which mandates that in civil proceedings evidence shall not be excluded on the ground that it is hearsay. This application was accompanied by a medical report to the effect that Mrs McFarland was not fit to give evidence. Hence it was not possible for any application to be made to call her as a witness.

[10] Article 5 of the 1997 Order makes it clear that on estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. It goes on to relate that regard shall be had in particular to whether the party by whom the hearsay evidence is adduced gave notice to the other party of his intention to adduce the hearsay evidence and if so the

sufficiency of the notice given. In this case there had been very late notice given for which delay counsel accepted full responsibility.

[11] Under Article 5(3) regard may also be had in particular to the following –

(a) Whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness. In light of the medical evidence adduced before me I was satisfied that the indisposition of the second defendant had occurred shortly after a preaction consultation with counsel at the Royal Courts of Justice and that it was not reasonably practical to produce her.

(b) Whether the original statement was made contemporaneously with the occurrence or existence of the matter stated (see above).

(c) Whether the evidence involves multiple hearsay. It did not in this instance.

(d) Whether any person involved had any motive to conceal or misrepresent matters.

(e) Whether the original statement was an edited account or was made in collaboration with another or for a particular purpose.

(f) Whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of the weight. I did not consider this to be the case in this instance

[12] Clearly a statement will not be given as much weight as evidence given orally which is subject to cross-examination and scrutiny by the court. The points made by Mrs McFarland were as follows:

- Accepting that an arrangement had been made with the plaintiff to carry out the work, Mrs McFarland alleged that she had not been expecting the plaintiff to call at her home that day. She had left the house at 9.00 am without seeing him and had not returned until 5.30 pm. It was only then she discovered an accident had occurred. The statement insisted that there was no discussion as to when he would do the job although she did ask him to let her know beforehand when he would be calling.

- She related that her husband confirmed to her that Mr McElhatton had arrived just as he was leaving for work.

- She visited the plaintiff in hospital and had asked him why he had arrived on a wet day to do this job. Allegedly he said to her that it was his own fault that the accident had occurred and that he should have had Val (his partner) with

him to hold the ladder. The plaintiff had said that it was not her fault that the accident occurred.

- She had never been asked by Mr McElhatton to make arrangements to assist him when he did call and she added "I must say that I find the suggestion that I or someone on my behalf would have been present to assist ludicrous. In any event Mr McElhatton would have known that if there was no response from the house and that my husband had left for work then the house was empty. I was never going to be assisting or arranging any assistance for Mr McElhatton. There was no such discussion at any time. It had never been contemplated. Mr Michael McElhatton had volunteered to do this job and I had left it totally to him."

Principles of law governing this matter

[13] It has long been the case that a plaintiff who is an unpaid volunteer worker can potentially succeed in an action for damages if he can show that he was present in some capacity which created a common law duty towards him. The leading authorities in this area are Hayward v Drury Lane Theatre Ltd and Moss' Empires Limited (1917) 2 KB 889 and Christmas v General Cleaning Contractors (1952) 1 KB 141. In the latter the Court of Appeal dealt with the duty owed by a club to visiting window cleaners. Not surprisingly the court reversed the first instance finding of liability of the club as occupier and the only issue dealt with by the House of Lords (1953) AC 180 was the liability of the window cleaner's employers.

[14] The modern approach at common law is to focus on the degree of control exercised by the user or borrower of the volunteer services and the consequential degree of reliance of the worker on the work being conducted safely. Munkman on Employer's Liability 15th Edition at paragraph 6.89 records:

> "The real test may well be simply one of foreseeability: was it foreseeable that the volunteer might be injured?"

[15] I found of assistance a decision by MacDermott LJ in Tanny v Shields Northern Ireland unreported judgments 16 June 1992 and it merits citing in some detail In that case the plaintiff was a farmer who had assisted his brother-in-law, also a farmer, in the potentially dangerous task of working a tractor on hills which were steep. The plaintiff was spraying across a steep slope when the tractor overturned.

[16] In that case the plaintiff knew that the defendant had cut and sprayed weeds in those fields before and collected his equipment from him. The defendant gave the plaintiff no instructions or advice about spraying the field or warning about the problems created by the slope. Nor did he suggest that his own four wheeled drive tractor was a safer piece of equipment for the job than the plaintiff's own two

wheeled drive model. In short the defendant was a highly competent and experienced driver of tractors on all kinds of grounds who readily accepted that tractors are notoriously dangerous vehicles. Finding for the plaintiff MacDermott LJ said:

> "On the evidence which I have heard I have no doubt and find that this was an extremely dangerous field to traverse with a laden tractor and especially one which was a two wheeled drive model. Driven by a man inexperienced and untrained in such work it was foreseeable and ought to have been foreseen by the defendant that an accident such as did occur might occur."

[17] Distinguishing this case from that of Christmas v General Cleaning Contractors the learned judge said:

> "That case would be of assistance if one were considering the duty of an occupier to a skilled contracted operator such as the defendant doing work such as the plaintiff was doing. But in the present case it is the occupier who has the knowledge and expertise – his visitor (the plaintiff) may be a farmer familiar with ordinary tractor work but he was not as the defendant knew experienced in the potentially dangerous task of working on hills."

Conclusion

[18] I have concluded in this instance that there was no breach of duty on the part of the defendants to the plaintiff and I therefore dismiss the plaintiff's case. I have come to this conclusion for the following reasons, applying the principles of law which I have earlier adumbrated.

[19] First, this plaintiff was experienced in this kind of work. I find it wholly implausible for him to have asserted that in forty years of using ladders as a labourer, he was unaware of the need to foot or secure a ladder and had no experience of this having been done. I do not believe this. I am satisfied that this was a man who was exercising his calling in using this ladder albeit on a voluntary basis and that he was well aware of the risks of ladders slipping as a special risk incident to this kind of work. His evidence was self-serving and unreliable in my view.

[20] Secondly, whilst the only evidence on behalf of the defendants was the statement of Mrs McFarland I can place sufficient weight on it to fortify my conclusion that it was not foreseeable for these defendants that any risks would

accrue to this man doing what is after all a fairly simply task for someone such as him. They were an elderly couple on whom the plaintiff manifestly placed no reliance. He never suggested they had any experience or knowledge of this kind of task. I find no evidence that they would have had any idea as to the risks that the plaintiff should address in this kind of work. There was no question of the defendants sharing their experience or advising this plaintiff as to how he should approach the task. In truth if the experience of foremen and skilled workers with whom he was clearly working over the 40 year period in the past had not taught him of or adverted him to the dangers of climbing a ladder without being footed or secured, he scarcely was going to take any advice proffered by two elderly people such as the defendants. On his own case he had made no attempt to contact Mrs McFarland for help or indeed to even ascertain her whereabouts. It seems to be common case at least that she was not there when it started to rain which of course was when the accident occurred.

[21] I find no evidence that the defendants had any knowledge or experience of this kind of work or that they had any control over the method of work carried out by the plaintiff. They were entitled to rely on him knowing what he was doing and choosing a safe method of work. It was not foreseeable that he would behave in the wholly negligent fashion that he did without any method of securing the ladder.

[22] In stark contrast to the plaintiff in Tanny's case there was no evidence that, the defendants were either sufficiently skilled or in a position to proffer any advice to this plaintiff in choosing a safe method of carrying out this work. Any advice that they had given would in my view have been likely to have been spurned given the massive experience that this man had in the past of working with people infinitely more skilled and experienced than the defendants. In short there would have been no question of him accepting their help or advice even had they been there to give it.