Neutral Citation No. [2006] NIQB 7 | *Ref:* **DEEF5453**

Judgment: approved by the Court for handing down | *Delivered:* **19/01/2006**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

HARRY MILLAR

Plaintiff;

-and-

TERENCE ROONEY, EDWARD CRANE, EAMONN CRANE AND SEAN CRANE

Defendants.

_____

DEENY J

The facts

[1] This action arises out of serious back injuries sustained by the plaintiff while constructing a hay shed for one or more of the defendants at Killough, County Down. The plaintiff was a welder. The first defendant, Terence Rooney was a small builder employed by the second defendant Edward Crane to build the hay shed on lands owned by Edward Crane's son Sean, the fourth defendant. A principal issue in the action was whether Edward Crane was the only occupier of the lands in question at the time with his son Sean the third defendant or whether his son Eamonn was also an occupier and liable to the plaintiff.

[2] Mr Liam McCollum QC appeared with Mr Thomas Fitzpatrick for the plaintiff. Mr Brian Fee QC appeared with Mr Michael Egan for the second and third defendants. The first defendant Terence Rooney was the subject of an order by Master Wilson QC filed 29 November 2004 ordering that, unless he complied with an earlier order of 10 June 2004 his defence "shall be struck out and the plaintiff shall be at liberty to enter judgment against the first defendant together with the costs of the action." I was informed by Mr McCollum from the Bar, and it appeared that the first defendant had not complied with the order. Indeed I note that his then solicitors came off record by order of the Master dated 27 January 2005. I gave judgment for the

plaintiff against the first defendant both because there was a breach of the order of the Master and on the basis of the evidence which I heard at the trial.

[3] The fourth defendant Sean Crane was added to the proceedings when it emerged that he was the owner of the land upon which the hay shed was being built. However a default judgment was entered against him on 5 April 2004. Both he and Terence Rooney were written to by Mr Paul McMullan, solicitor for the plaintiff, on 21 September 2005 informing them of the dates of the trial and strongly advising them to seek assistance and representation. Neither responded nor were represented at the hearing. Neither appeared when their names were called in the Royal Courts of Justice at the commencement of the hearing.

[4] The plaintiff was an American gentlemen who earned his living in two ways. Firstly he did some welding. Secondly he acted as a foster parent with his wife for children with serious disabilities. He was asked by Terence Rooney to assist him with the construction of the hay shed at Killough which would involve welding and other work. He was told by Rooney that this was on behalf of both Edward and Eamonn Crane. There already was a corrugated iron hay shed on the land. Mr Rooney was directed to build a lean to on to that about 25 feet in length also constructed of steel and corrugated iron. When the structure was partly completed it was necessary to secure the corrugated sheets to the steel members. On or about 5 September 1998 the plaintiff and Terence Rooney engaged in doing this by using a open box that they had found on the land and placing two or three planks upon it. I was informed that these planks were not secured in any way. Although the structure is only about 4 feet 5 inches high the plaintiff was working at full stretch on the planks to secure bolts between the vertical iron upright and the beam. His work was made more difficult by the fact Rooney had run out of bolts for this work and there were less of them in place than there ought to be. Furthermore the last ones that were being used at the end of the process were the wrong size. The engineer for the plaintiff Mr McLaughlin did not lay great stress on this but it certainly would not have eased the plaintiff's difficulties. The beam itself was being held in the air by the rather makeshift use of a forklift truck. While the plaintiff was on the makeshift trestle the beam was lowered down and as the pressure come on it moved and startled the plaintiff who fell and suffered a serious injury to his back.

[5] It is clear that these arrangements did not constitute either a safe system of work or the provision of safe plant and equipment with which the plaintiff was working and there can, in my view, be no dispute about primary liability.

[6] However I consider that the plaintiff must bear significant responsibility for the accident and that he was guilty of contributory negligence. He was himself an experienced workman. He honestly admitted

that he had not protested about these arrangements to Mr Rooney. He himself had participated in the placing of the planks on the box and had not secured them or ensured that they fully covered the open box upon which he was standing. Furthermore the evidence of his own engineer suggested that his apprehension about the beam falling upon him was misplaced as the smaller bolts would have been sufficient to carry the strain, as indeed proved to be the case. Nevertheless the standard here falls well below any modern standard of care. I note that no written design of any kind existed for this large shed, let alone any contract for the works. I note that not only was the platform inadequate but the bolts were inadequate in number and in size. There was no evidence that any risk assessment had been carried out. The only other employee involved was the fourteen year old boy from time to time. Taking various factors into account I have concluded that the plaintiff is liable to the extent of 30% for contributory negligence with the first defendant liable for 70%.

[7] Two issues then arose which were linked. As was stated openly in court Terence Rooney had no insurance and was not thought to be a mark for damages. The same was apparently true of Edward Crane who had indisputably instructed Terence Rooney. While I do not and need not know the insurance position of Mr Eamonn Crane it was the evidence before me that he had a successful business in Downpatrick. The plaintiff was therefore anxious to try and make him liable. The second defendant's case was that he had employed Terence Rooney as a competent independent contractor and therefore was not liable. The third defendant agreed with that submission, appearing through the same counsel, but maintained that he had not employed Terence Rooney in any way and was not an occupier of this land and was in law not liable even if Terence Rooney was not found to be a competent independent contractor. I will return to the legal issues in due course.

[8] The plaintiff's case was that the second and third defendants were joint occupiers who had not satisfied themselves that Rooney was a competent independent contractor. They were liable for him as they were willing to give him instructions and indeed supplied equipment for the works. As previously indicated Terence Rooney did not give evidence but I did hear from the plaintiff who seemed to me an honest and conscientious witness. He said that Mr Rooney had come by his home in Saul, County Down and asked him to give him a hand welding plates onto beams for this lean to shed. He drove to the site at Killough. As far as he could remember the materials for the building were on site and he did not know who had provided them. He cut and welded beams. No trestles were provided. The metal box previously referred to was already on the premises as was the timber. Both Edward and Eamonn Crane would "pop in" while he was working. He thought they were the owners of the property. Eamonn had called twice and Edward once. The former expressly told the plaintiff to be careful not to let welding sparks go

into the existing hay shed. They were not present at the time of the accident. At that time he had objected to Mr Rooney that bolts were too small and too few, but Rooney disagreed with him and told him to go ahead with the smaller bolts. In cross-examination he admitted that he had his own oxy acetylene equipment for the welding although this was not in fact his but lent to him by a local farmer. He did own his own welder. He did not think that he had worked for Mr Rooney before. He had agreed £20 a day with Mr Rooney for the work and he was there roughly a week, but had not had his wages at the time of the accident.

[9] Mr Egan put to him that the fourth defendant Sean owned the land but following a family dispute had moved away. His father Edward the second defendant then used the field to keep ponies in which he put to traps. The plaintiff had no knowledge of this but he did know Eamonn Crane from his tyre business in Downpatrick. As well as the box referred to there was a ladder on the property but the plaintiff did not know who provided that. Edward Crane was sometimes to be seen working in his son's business in Downpatrick. He admitted that he had no knowledge to contradict Eamonn's assertion that the construction of the hay shed was not to do with him. He honestly could not say whether or not Rooney had got the timber planks to put on the metal box that he was standing on at the time of the accident. They did definitely come from the land. He agreed that on reflection it was a most unsafe platform that he would not use again, although he had used it in the course of the work before the accident. The bolts he had to use were not big enough and were therefore a potential for instability. He was doing the best he could. Mr Rooney had not invited him to get down from the platform before letting the beam take the weight. He was startled and went backwards when the beam appeared to be coming down on him. He had seen Eamonn Crane talking to Mr Rooney. Apart from the reference to the existing shed he had given him no directions about his work. He did not disagree that he was a little careless on this occasion. He had no criticism of the Cranes.

[10] In re-examination he believed that Rooney had not owned a tractor before or after this accident. The box came from the site and probably so did the ladder. In answer to me he admitted that there probably would have been more planks on the site. He should have used them but he wanted to get the shed finished.

[11] He was followed by his consulting engineer, Mr Michael McLaughlin. He believed that smaller bolts would have been more than adequate to hold the beam which would be about one half of one hundred weight. However there could have been movement as the weight of the beam came off the bucket. In the long term two bolts would not have been enough although it would have held the beam in the short term. It was a bad practice for him to be beneath the beam when the weight came on it, especially if the bolts were not properly secured. The Construction (Health and Safety at Work)

Regulations 1996, No. 6 required that steps ought to be taken to prevent the plaintiff falling while working at such a height. I find that that Regulation was not complied with here. At the inspection which Mr McLaughlin attended a Mr Crane came along who was about 40 years old. That could be Eamonn Crane but Mr McLaughlin could not say that it was anybody in court, which Eamonn Crane was at the time.

[12] At the conclusion of the plaintiff's case (subject to evidence of financial loss) Mr Egan for the defendants submitted that there was no case to answer. I did not accept his submission that the plaintiff had not made out a prima facie case of Rooney's incompetence as an independent contractor, nor that there was no evidence at all that the third defendant might be a joint occupier. In reply Mr Liam McCollum QC for the plaintiff drew attention to the statutory provisions. He applied to amend the pleadings to clarify his case with regard to the role of the independent contractor. I granted him leave. The particulars of negligence in the statement of claim were therefore amended by the addition of the following:

> "(p) Failing to employ a competent independent contractor;
>
> (q) Failing to carry out any or adequate investigations and appropriate steps in order to satisfy themselves that the first defendant was a competent contractor and that the work was being undertaken in a safe and suitable manner."

This was done ex abundante cautela as arguably it was not necessary because this was in fact a defence being advanced by the defendants rather than part of the plaintiff's case. I accepted his submissions and rejected the balance of Mr Egan's application. It is right to say that Mr Egan in reply pointed out that no case had been pleaded that the Cranes employed Mr Rooney rather than retaining him as an independent contractor.

[13] The second defendant Edward Crane then gave evidence. He was 68 years old and retired from the car trade. He did office work for his son Eamonn in Downpatrick. His son Sean owned the land but he was not in contact with him following a family dispute. He, Edward, used the land to keep driving ponies on. There was a family house across the way but it was not that of Edward, but his sister Mrs Jacqueline Doyle. In 1998 he, decided to put a shed on the land as shelter for his ponies in the winter. The existing shed was full of materials belonging to his son Sean. He knew of the first defendant through his son and approached him with a view to erecting a shed which he advised should be a lean to. It was known to Edward Crane as a local builder. He provided him with some money for materials, the nature of which were discussed. He admitted that he made no enquiry from Rooney

about whether or not he had insurance. He subsequently admitted that Mr Rooney had no office or entry in the Yellow Pages or printed headed notepaper. He claimed that he noticed the three or four men working about the place but not a boy. He said that he was there once or twice a day to keep an eye on Rooney. He denied giving any directions, or providing the ladder or box which he claimed to know nothing about. He learnt of the accident through his wife. Rooney did not ring him. The work came to a halt after the accident and Rooney did not return to the site. Furthermore he did not return Edward Crane's phone calls and his mobile number changed. He never completed the job which was subsequently completed by another builder. He denied that he had been assisted by his son Eamonn in the construction of this lean to.

[14] He was cross-examined by Mr McCollum QC. I have to say as a generality that a number of his answers were inconsistent. He was not a convincing witness. He was evasive about his son Sean. Although he admitted working quite a lot for his son Eamonn he denied that he received any income at all for doing so. Although he denied having any savings he claimed to be financing the building of the shed out of his own money. He admitted he had no design or paperwork at all from Rooney for the shed. It was hard to believe his claim that he had no idea where the equipment used in the construction of the shed had come from. I prefer the plaintiff's evidence that certainly the box and probably the ladder and tractor did not come from Rooney but from this defendant. When asked whether it was not obvious that Rooney had no insurance he answered that he did not know. He admitted that he had a van without any name or business address upon it. When asked whether he had any reason to be assured about Rooney's competence he said:

> "I took no interest. I wouldn't know."

He claimed not to know whether his son Eamonn was a man of substance, although it later transpired that he had a substantial house in Killough as well as his business in Downpatrick. There was a little confusion about the address of the house which I do not hold against the witness. If the matter had stopped there the slight evidence of the plaintiff may well have been enough to satisfy me that Edward Crane was not involved in this project on his own but jointly with his son Eamonn. However that son then gave evidence before me on Tuesday 22 November. He was frank in his answers that he knew both the plaintiffs and Rooney. He was aware of the lean to shed but he had engaged nobody in connection with it. He was not involved in his father's hobby of driving ponies. He may have called in on the site during the week as he lived nearby and his sister lived directly across the lane. He said that if Mr Millar said that he had told him to mind the hay in the shed he probably did say that. It was not his hay but probably belonged to his father.

He denied being present at the inspection which Mr McLaughlin attended and pointed out that he had two other brothers in their 40's as well as the defendant Sean Crane. He denied having anything to do with Rooney or having any knowledge of any of the equipment. He was cross-examined by Mr Tom Fitzpatrick for the plaintiff. Doubt was cast on this alleged feud with his brother Sean but it then emerged that Mr Eamonn Crane's own son had been killed and his brother Sean had not even attended the funeral. I accept his evidence and I accept that it points to a deep family rift. He had told his father that he was "insane" to build the shed on Sean's land because his father knew what Sean was like.

[15] Pausing there it is clearly not a sensible thing to spend money building on land that belongs to somebody else, particularly if you are on bad terms with that person. It is easy to infer that a successful businessman like Mr Eamonn Crane would not be party to such a project. Although he admitted knowing Rooney he had no part in selecting him. He knew about tyres not buildings. He had nothing against Mr Millar who indeed continued to be a customer of his but he had not seen Rooney since the accident. It was several years since he had been at the field. He pointed out that Mr Millar knew him and so that if it was him who attended the inspection he could have told Mr McLaughlin that it was him rather than just saying it was one of the Crane's. He did not store goods on the land himself. It is now being rented by Mr Kennedy. He has a large storage shed in Downpatrick himself. He contradicted his father, in a way I find convincing, by saying that the father did have cash of his own and did not spend a lot of money. He also contradicted his father, also in a convincing way, by saying that he did give him cash when he worked in his business. This was the son's business which was entirely separate from the father's former business. That completed the evidence for the defendants.

The Law

[16] I had the benefit of helpful submissions from learned junior counsel as to the relevant authorities, which supplemented the opening of Mr McCollum QC, and I turn to consider those. Mr Egan sensibly accepted that his first client, Edward Crane, was an occupier of the property at the time in question. He also accepted that he could in law be in joint occupation with either Mr Rooney or Mr Eamonn Crane although he strongly disputed that the latter was the case.

[17] There was discussion relating to the meaning of Section 2 of the Occupier's Liability Act (Northern Ireland) 1957. I set out the section in full:

"2. -

(1) An occupier of premises owes the same duty, the "common duty of care ", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases —

(a) an occupier must be prepared for children to be less careful than adults; and

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if

> any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.
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> (5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).
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> (6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not."

[17] By virtue of Section 2(2) the occupier owes a duty to take reasonable care of his visitors. There is no doubt that the plaintiff was a visitor in that sense. Section 2(3)(b) has perhaps some relevance although not expressly relied on by the defendant. The crucial provision, it seems to me, is Section 2(4)(b) ie it is clear that "damage" is caused to the plaintiff by danger due to the faulty execution of a work of construction by an independent contractor employed by the occupier. I will consider the relevant authorities in due course but I consider that provision extends to works actually being carried out in which the plaintiff was involved. The main thrust of Mr Egan's case was to rely on the rest of that paragraph ie that the occupier was not to be treated without more as answerable for the danger "if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he reasonably ought to satisfy himself that the contractor was competent and that the work had been properly done." I will consider in due course what steps he did take and contrast those with the evidence of the plaintiff that he had not acted reasonably in entrusting this work to Mr Rooney and could not be reasonably satisfied that he was a competent contractor.

[18] I observe in passing that Section 2(5) confirms my response to Mr Egan's contention that the plaintiff was not entitled to recover as he had consented to undergo the risk involved. The modern law of volenti requires far more than the mere acquiescence by a workman in an unsafe system. For him to willingly accept the risk as it is put in Section 2(5) something much more is required. In any event I note that volenti non fit injuria was not pleaded in the defence. There was no "voluntary agreement to absolve the defendant" to use the phrase used by the learned editors of Clerk and Lindsell on Tort 18th Edition, at p. 372.

[19] I was referred to a number of authorities by counsel in their helpful submissions. In Christmas v Blue Star Line Limited and Anor [1961] 1 Lloyds Rep a weld on a step-ladder was defective and finally gave way, perhaps after some 15 years. The occupier was liable and could not pass liability to an independent contractor because it was not known who had carried out the work 15 years previously. I note further this judgement in the passage of Paull J at p. 104:

> "The only negligence so far as they are concerned, is that in some dim and distant past year somebody somehow did this negligent act, and they cannot get out of liability under the Occupier's Liability Act, 1957, because they cannot show that the work was done by a sub-contractor and that they took all reasonable steps to examine the work that was done."

I observe that in this case Mr Edward Crane seems to have taken no steps to examine whether the work was being done safely although he did appear a number of times on site.

[20] I was referred to a decision of the House of Lords in Ferguson v Welsh [1987] 1 WLR 1553. That is authority for the proposition that the liability of the occupier extends to work being done by the independent contractor and not merely work that had been done in the past. At p. 1560 Lord Keith of Kinkel considers the alternative view, put forward here by Mr Egan:

> "That would, however, in my opinion, be an unduly strict construction, and there is no good reason for narrowing the protection afforded so as not to cover liability from dangers created by negligent act or omission by the contractor in the course of his work on the premises. It cannot have been intended not to cover, for example, dangers to visitors from falling masonry or other objects brought about by the negligence of the contractor. It may therefore be inferred that an occupier might, in certain circumstances, be liable for something done or omitted to be done on his premises by an independent contractor if he did not take reasonable steps to satisfy himself that the contractor was competent and that the work was being properly done."

[21] As I come to the conclusion that Mr Edward Crane did not take reasonable steps to satisfy himself that the contractor here was competent it

was not necessary for me to consider the different emphasis put by Lord Keith and Lord Gough on the duty on the occupier when he has reason to suspect that the contractors system is not reasonably safe. Mr Crane falls at the earlier hurdle.

[22] Gwilliam v West Herts Hospitals NHS Trust [2003] QB 443 is a decision of the Court of Appeal in England relating to a plaintiff injured at a fundraising affair at a hospital due to the negligence of a game organising independent contractor retained by the hospital. The contract was clearly liable but uninsured. Was the hospital liable? Lord Woolf LCJ considered, at para. 14, that prudence required the insurance position of an independent contractor to be checked. That was relevant to whether it was a competent contractor within the meaning of Section 2 of the 1957 Act. I note also that at para. 11 Lord Woolf LCJ reminds us that Section 2(4)(b) is only an example of the circumstances which indicate that the duty has been discharged. In that case there was a failure of equipment used by the independent contractor. I agree with the view also expressed by him that "The fact of insurance would go to their competence" ie of the independent contractor. He did not go as far as to say that they would have to check the terms of the insurance policy. Such matters would be an assessment of fact by any judge in my opinion. If the independent contractor was being retained for a brief job with no risk, such as gardening, it may not be necessary to enquire about insurance at all. Equally well if it is a large, well established firm it may be presumed that they would have the relevant employers' liability and public liability insurance. But in between there must be a range of situations, such as this, where one is employing an individual to erect a building where obviously risks will occur if the construction is not carried out with care and in those circumstances I agree that common sense requires one to make enquiries about the insurance position. As Lord Diplock said in DPP v Hester [1972] 3 All ER 1056 at 1072 "common sense is the mother of the common law."

[23] Mr Egan relied on Salsbury v Woodland and Others [1971] QB 324 (C.A.). In that case the plaintiff was injured, in rather strange circumstances, at least in part due to the negligence of a contractor who was cutting down a tree for the first defendant. On appeal the first defendant succeeded on the basis that he had employed an apparently competent tree-felling contractor and was not therefore liable for his negligence. The employment in that case was quite casual in that the first defendant had asked the foreman of the contracting firm who were working next door to come and fell the tree for her. "She, quite properly, accepted the contractor as a man of competence and experience appropriate for the job, and employed him to fell the tree." He returned a few days after the conversation to do so. I consider that the felling of a tree, although something that can clearly cause a hazard, is a significantly simpler task than the construction of a lean to shed with beams of considerable weight. I observe also that it may well be that in the judgment of the judge at first instance there was further material indicating why the

first defendant "quite properly accepted the contractor as a man of competence and experience" over and above seeing this man working at a neighbouring house. The case can be distinguished, even if it were to be decided in exactly the same way today, which might be open to discussion. I note in particular that at pp. 3 and 36 F Lord Justice Harman expressly says:

> "… and it is not challenged that he selected an apparently competent independent contractor."

Clearly therefore the matter was not argued to the contrary before the Court of Appeal. Mr Egan also referred to Babcock International v National Grid [2000] (Unreported: Eady J); and to Wheat v Lacon Company Limited [1966] AC 552 and to D & F Estates Limited v Church Commissioners for Children [1989] AC 177 but I do not consider that these authorities assist him on the facts of this particular case. I find that AMF International Limited v Magnet Bowling Limited [1968] 1 WLR 1028 does not assist him. The occupier there was found liable as they had not satisfied themselves that the work was done properly by the contractor.

Conclusions

[24] I therefore turn to consider the position of the second and third defendants in accordance with the legal principles referred to in light of the evidence. I accept the submission of Mr Thomas Fitzpatrick that there is an onus on the second defendant, who admits he is an occupier, to show that he had acted reasonably in entrusting the work to an independent contractor and had taken such steps as he reasonably ought in order to satisfy himself that the contractor was competent. The last few words of Section 2(4)(b) are not in truth applicable here although a reminder of the general principle. I have set out above the very limited steps taken by Mr Edward Crane to establish the competence of Mr Rooney i.e. he knew that he had done work for some local farmers. Against that the following must be taken into account. Mr Rooney had no office, no entry in the phone book, no home phone number. He had a van but not bearing his name or address. He was not, apparently, a member of any recognised builder's federation. He, on the evidence, did not bring with him the equipment necessary for this construction. He prepared no design for this large shed. He entered into no contract with Mr Crane. Mr Crane made no enquiry of any nature as to whether he had insurance. There was no risk assessment by Mr Rooney. All those matters are damming against Mr Edward Crane. It is also right to say that on his own evidence that he was attending once or twice a day to see how work was progressing and he should therefore have noticed, as I found that Mr Rooney was employing a 14 year old boy as a labourer and was using a wholly unsuitable box and a few planks as a platform. He may not have known about the bolts but he had plenty of evidence before that which would have called into question the competence of Mr Rooney before this

was demonstrated by the accident. I find therefore that Mr Edward Crane is liable as occupier and has failed to establish the defence under Section 2(4) of the Occupier's Liability Act 1957. Given that he is vicariously liable on those facts for the negligence of Mr Rooney he is, like Mr Rooney, 70% to blame for the personal injuries, loss and damage sustained by Mr Millar.

[25] I then turn to the much debated issue as to whether Mr Eamonn Crane was an occupier. I have set out his evidence above. It is not necessary for me to repeat it. It seems to me that the plaintiff's evidence that he was an occupier is in truth weak. There is the hearsay evidence from Mr Rooney that he was doing the work for both Edward and Eamonn Crane. There was also the fact that Eamonn Crane was present twice during that week and on one occasion cautioned Mr Millar against setting fire to the hay in the barn. On the other hand there was absolutely no need for Mr Eamonn Crane to be involved in the construction of this lean to shed. There was no evidence or indication that he shared his father's interests in keep ponies. It was not his land. I considered his evidence credible when he thought that this was "insane" thing to be doing on the land with another brother with whom they had fallen out. While it is possible that he was assisting his father in some way or took more interest in the matter than he is prepared to admit it seems to me that the evidence does fall short of establishing that he was an occupier. The onus on that regard is, of course, on the plaintiff. I find that onus is not discharged and that Mr Eamonn Crane was not an occupier of his brother's lands and he is not liable for the personal injuries loss and damage sustained by Mr Millar. I consider that if Mr Eamonn Crane had been involved in this it is likely that he would have checked the insurance position. To take only one obvious example: what would have happened if Rooney and Millar had burned the shed down in the course of the work? Who was to pay for that? I think any sensible person would have wanted to check that Mr Rooney had insurance before he allowed him to use welding equipment close to a barn full of hay. I would have to find that Eamonn Crane perjured himself, to find for the plaintiff, which I do not do.

[26] Part of the plaintiff's case was that Eamonn was the brother of Sean Crane the owner of the land and that Eamonn also lived in Killough and that his sister lived just across the road. This does not seem to me to amount to evidence of occupation and I decline to draw any inference from it adverse to the defendant on the facts of this case.

Quantum

[27] After the conclusion of the trial I was furnished with the bundle of agreed medical evidence. The key injuries sustained by the plaintiff were compression fractures of L1 and L5. The plaintiff was seen on three occasions by Mr John Haliday FRCS. On the first he considered that it was quite possible that the plaintiff would not recover sufficiently to go back to any

work involving climbing heavy lifting or stooping given the injury to his back. In his second report from February 2000 Mr Haliday noted the complaint of continuous pain but thought there must be some introspective element in this. He did acknowledge that the plaintiff was "quite markedly disabled."

[28] A report was then obtained from Dr PD Hanlon, Consultant Radiologist, based on a CT Scan of the lumbar spine on 6 March 2000. He found that the fracture at L5 had caused deformity of that process with residual bony bulging which was compressing the right fifth lumbar nerve root. In the light of that Mr Haliday concluded that the plaintiff would probably not return to his engineering work. He saw him again in 2004 and repeated that he considered that he had a markedly sub-normal spine which was the source of ongoing pain. He also thought he was suffering some element of depression, which was consistent with the impression he gave in court. He was referred to a Dr Arthur Daly, Consultant Psychiatrist, on 25 January 2005. He noted anxiety, depression and other symptoms in the history and records although he did not think he was suffering from a psychiatric illness when he saw him. Therefore this is a situation of a significant injury to the back which has caused understandable mood change by preventing this man from working and thereby reducing his income and restricting his activities. I note the plaintiff was born on 7 July 1950 and is now 55 years of age. I consider in all the circumstances that an appropriate award of general damages would be £35,000.

[29] In addition to that the parties helpfully agreed three heads of financial loss. These were subject to my being satisfied that one or more defendant was liable for injuries causing such loss in the light of the plaintiff's evidence. I am so satisfied. I therefore award in addition to general damages:

(a) £17,045.25 with regard to special damages to date. (I was informed these were likely to be exceeded by the repayment to the Compensation Recovery Unit).

(b) The sum of £25,665.12 because of the inability of the plaintiff and his wife, when she fell ill, to cope with a particularly disabled child who was in long term foster care with them. It represents income of £10,968 per annum multiplied by 2.34 to the boy's age of 18. I note in support of that heading of damage he and his wife had cared for two boys John and Rory. John who was doubly incontinent and had other physical disabilities had left in August 2004 because he and his wife could not cope with him. He considered him his son and still visited him in Glencraig when he could.

(c) £6,980 representing life-time partial loss of services caused by the injuries at £500 per annum multiplied by 13.96.

[30] I say two things for completeness. These sums were agreed on behalf of the second and third defendants and not the other defendants. However they were opened to me and I conclude that they are proper figures to award against the other defendants who were not represented. I also record the fact that because of the casual nature of his employment no claim was being made for the loss of the plaintiff's earnings as a welder. The parties, as I understand it, have included any claim for interest in these figures.

[31] Therefore I give judgment for the plaintiff against the first, second and fourth defendants but not against Eamonn Crane, third defendant, in the sum of £47,351.59, after deduction of contributory negligence with £11,931.67 by way of special damages.