Neutral Citation no. [2008] NIQB 29 | *Ref:* **COG7098**

Judgment: approved by the Court for handing down | *Delivered:* **29/02/08**
*(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:

NOEL McCAFFREY

Plaintiff;

-and-

JIM ARMITAGE T/AS MONAGHAN BROTHERS SERVICE AND CAR SALES

Defendant.

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COGHLIN J

[1] The plaintiff in this case, Noel McCaffrey, was born on 19 December 1947 and is a self-employed window cleaner. On 2 September 2002 the plaintiff was cleaning a sign at the defendant's business premises, Monaghan Brothers Service and Car Sales, Lisnaskea, County Fermanagh, when he fell to the ground from a ladder and thereby sustained personal injuries. The injuries suffered by the plaintiff included a head injury involving a temporal bone fracture, a contusion to the left frontal lobe of his brain and a devastating spinal cord injury as a result of which he has been completely paralysed from the level of his lower thoracic spine. The plaintiff is wheelchair bound with no function present in his lower limbs, bladder or bowels. During his hospitalisation he developed an MRSA infection. He continues to suffer from headaches, back pain, irritability, frustration and depression. After the case was opened before me, prior to the start of the evidence, quantum was agreed between the parties at a figure of £500,000 with the defendant agreeing to discharge the CRU of £40,521.

[2] The plaintiff was represented by Mr Brian Fee QC and Mr Niall Hunt while Mr Conlon QC appeared for the defendant with Mr Hugh McMahon. I

am grateful to both sets of counsel for the professional manner in which they conducted the proceedings and the assistance that I derived from their well constructed oral submissions.

The factual evidence

[3] The plaintiff has worked for most of his life in Ireland, apart from a period when he was employed in London during the 1970s. At different times, he has worked as a roofer, chimney cleaner, window cleaner and general handyman. In approximately 1996 the plaintiff became self-employed as a window cleaner/chimney sweep in the Lisnaskea/Newtownbutler/Enniskillen locality. The plaintiff gradually acquired a number of regular customers one of whom was the defendant Mr Armitage.

[4] Mr Armitage worked as the sales manager at Monaghan Brothers for approximately 20 years before becoming the owner of the business approximately 5-6 years ago. As well as the premises at which the plaintiff's accident occurred Mr Armitage also owns another business some 300 or 400 yards further along the road known as the Lisnaskea Accident Repair Centre.

[5] Living in the same locality, the plaintiff and the defendant have been known to each other over a life time but their business relationship appears to have commenced in or about 1996/97. At that time, it seems that the plaintiff purchased a car from the defendant and, when doing so, a conversation took place about the possibility of the plaintiff cleaning the windows at the car sales premises a well as the defendant's private house and that of his mother. An agreement was reached as a result of which the plaintiff was to clean the windows of all three premises approximately once a month, or in response to specific requests, for which he was to be paid a global figure of £60. Essentially, the plaintiff seems to have been a "one man" business and his equipment comprised his vehicle and an aluminium extension ladder together with the usual bucket, cloths and chamois leathers. Sometimes the plaintiff would arrive with an assistant, Peter McCormick. In cross-examination he agreed that Mr McCormick's role was not specifically to foot the ladder but to assist in completing the work in a shorter time. The plaintiff also accepted that during his working life prior to the accident he had regularly used ladders in the course of roofing, cladding or factory work and that, consequently, he was confident and comfortable working at heights. He agreed that he always brought his own equipment to a job and that it was he alone who decided upon the method of work and the manner in which the equipment was to be utilised. It seems clear that, over the years, a satisfactory and positive relationship existed between the plaintiff and the defendant with each supporting the other in his own particular line of business. However, while there seemed to be little difference between the parties with regard to the history of their business relationship, during the course of their evidence a

major conflict emerged with regard to the circumstances of the plaintiff's accident.

[6] The plaintiff said that when he attended at the defendant's car sales premises in or about August 2002 for the purpose of cleaning the windows as usual he was asked by the defendant whether he would be prepared to clean the signs at the premises. The plaintiff, who had never been asked to clean the signs before, agreed to perform this work as soon as he had a free day. According to the plaintiff this request was limited to the "Monaghan Brothers" sign on the fascia of the main sales premises ("the fascia sign"). The plaintiff said that he returned to perform this task on the day of the accident arriving at about 9.00 am. As usual, he was unaccompanied. In opening the case on behalf of the plaintiff Mr Fee QC described how the plaintiff had reported to the defendant on the morning of the accident confirming that he had arrived to clean the fascia signs. On the other hand, in the course of giving direct evidence the plaintiff maintained that there had been no discussion with anyone before or during his cleaning of this sign. When this inconsistency was put to him in cross-examination he said he could not recall reporting to Mr Armitage although he "might have". The plaintiff claimed that, after completing the fascia sign, he stowed his equipment and, in accordance with the usual practice, went into the premises to obtain payment. In the course of doing so he said that he met the defendant who said that, since he was there, he might as well do the free-standing signs as well ("the free-standing signs"). One of the free-standing signs that the plaintiff was to clean was similar to the sign currently displayed at Lisnaskea Accident and Repair Centre, illustrated in photographs P5, 6, 7, 8 and 9 although, at the time of the accident, it seems that the top panel advertised the motor manufacturers "Ford". According to the plaintiff, cleaning the free-standing signs had not been mentioned before and he responded by pointing out that he had no assistant with him to hold his ladder. He claimed to have told the defendant that the free-standing signs were dangerous because of the lack of grip between the top of the ladder and the surface of the signs. The plaintiff said that the defendant responded by asking him to "carry on" and undertaking to arrange for someone to come out and hold the ladder. There were a number of vehicles parked quite close to the base of the sign which restricted the area available for the ladder and, in the plaintiff's opinion, resulted in it being placed at too steep an angle. The plaintiff said that he might have waited for 5 or 10 minutes for a man to arrive but, when no one came, he proceeded to clean one side of the free-standing sign. He said that it was necessary to do so very carefully and that there were a few "wobbles" of the ladder. He considered that it was "very dangerous" work insofar as he had to hold on to one side of the sign with one hand and use the other to carry out the washing movements. He managed to complete one side with "a lot of bother". When he moved his ladder to the other side of the sign he found that the angle was even steeper because of parked cars and, accordingly, he went back to the defendant to enquire about available

assistance. To use his own words, the plaintiff said he was "sharper" on this occasion and used words such as "are you going to send me a man or not?" According to his evidence, the defendant again promised to provide a man but asked him to carry on in the meantime. The plaintiff went back to the sign but, after waiting few minutes, decided to proceed to clean the other side. When asked about why he did not wait longer the plaintiff said that he had other window cleaning commitments to meet that day and that he felt compelled to continue because he did not want to risk jeopardising his contract with the defendant. It seems that the plaintiff's accident occurred as he mounted the ladder to commence cleaning the second side of the free-standing sign.

[7] The defendant's evidence recorded a very different version of these events. The defendant agreed that he had asked the plaintiff if he would be willing to clean the signs some months prior to the accident but he maintained that this agreement extended to both the fascia and the free-standing signs. He denied that the plaintiff had reported to him on the morning of the accident or that there had been any conversation between them as to the provision of assistance or otherwise. The defendant maintained that he had not been aware of the presence of the plaintiff on the premises on the day of the accident until one of his employees came into the office to phone for an ambulance. At that point the defendant said that he went out to investigate and found the plaintiff lying at the foot of the sign on the side facing the town with his ladder lying on the same side pointing out across the footpath. He was being comforted by an employee, a lady and a local GP and the defendant made arrangements for his daughter to bring the plaintiff's wife to the premises from the school at which she worked.

The plaintiff's case

[8] Recognising the fundamental conflict of evidence relating to the facts, Mr Fee QC advanced the plaintiff's case with reference to alternative factual findings. On the basis that the plaintiff had been first asked to clean the free-standing sign on the date of the accident and that, upon that occasion, Mr Armitage had given clear undertakings that assistance would be provided in order to foot the plaintiff's ladder Mr Fee QC submitted that a clear case of negligence and breach of statutory duty had been established. Mr Fee QC further argued that if the evidence relating to the undertakings alleged to have been given by the defendant was rejected and either the plaintiff's evidence that he was first asked on the morning of his fall or the defendant's evidence that he had been requested to clean the free-standing sign sometime prior to the day of the accident was accepted the Plaintiff should still succeed in establishing negligence and breach of statutory duty on the basis that the defendant had failed to take any adequate precautions to ensure that the area around the free-standing sign that he required to be cleaned was sufficiently

safe and free from parked vehicles to enable the plaintiff to place his ladder in a secure and stable position.

[9] During the course of his submissions Mr Fee QC reminded me of the "neighbour principle" referred to in the celebrated judgment of Lord Atkin in Donaghue v Stevenson [1932] AC 562 and the four basic requirements of the tort of negligence, namely, the existence of a duty of care situation, breach of that duty of care by the defendant, a causal connection between the defendant's breach and the damage and establishing that the particular kind of damage sustained by the particular claimant was not so unforeseeable as to be too remote. He drew my attention to the frequently cited passage from the judgment of Lord Bridge in Caparo Industries Plc v Dickman [1990] 2 AC 605 at 617/8 in which he provided the following summary of the relevant authorities:

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."

In that context Mr Fee QC emphasised the importance of Mr Armitage's knowledge that the plaintiff was in business for himself in a relatively small way using only the most basic equipment of the window cleaner's trade, namely, a ladder, bucket and clothes. He argued, that in promising an assistant for the plaintiff, the defendant had undertaken a specific assumption of responsibility and that, even in the absence of such an assumption the defendant owed the plaintiff a positive duty of care both at common law and in accordance with the provisions of the Occupiers' Liability Act (Northern Ireland) 1957.

[10] On behalf of the defendant Mr Conlon QC emphasised that the plaintiff was not an employee of the defendant but was an experienced and skillful self-employed window cleaner who had been engaged by the defendant to carry out a service at his premises in return for an agreed price. It was the plaintiff rather than the defendant who controlled and was responsible for the manner in which the work was to be done, the equipment that was to be used and the assessment of any safety precautions that might require to be adopted. In the context of the plaintiff being a self-employed independent contractor Mr Conlon QC relied upon Section 2(3) (*b*) of the Act

of 1957 which provides that 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. He reminded me that the plaintiff had decided to bring an assistant with him upon previous occasions, although, apparently, he was not used to foot the ladder, and that he had previously requested the defendant to move cars when he had considered it necessary. I note that, with reference to Section 2(3) (*b*) of the 1957 Act, the learned authors of the 19th Edition of Clerk and Lindsell on Torts note at paragraph 12-35:

> "The reason for this is self-explanatory. A window-cleaner's job, for instance, is inherently dangerous, and questions as to the adequacy of handholds and the like are for him and not the occupier to determine."

In Caddis v Gettrup (1967) 202 E.G. 517 an occupier was exonerated where an experienced window cleaner lost his balance when ornamental trellis work broke away.

Conclusions

[11] After carefully considering the evidence I am satisfied on the balance of probabilities that the plaintiff was not telling the truth when he alleged that, upon two occasions, Mr Armitage undertook to provide him with a helper to hold the ladder. According to the plaintiff when Mr Armitage said that he might as well do the free-standing sign while he was present he specifically told him that the sign was dangerous and that he needed someone to hold the ladder. When no helper was sent as promised he said that he was "sharper " when he went to the office on the second occasion and said something along the lines of "are you sending me a man or not?" He maintained that the defendant's failure to provide him with a helper as promised was the reason that he found himself in court and he agreed that these allegations were "absolutely basic" to his case. Despite that evidence, no reference to any offer by the defendant to supply a helper or his alleged failure to do so appeared in the plaintiff's statement of claim served on 1 February 2006 or in the plaintiff's replies to the defendant's notice of further and better particulars served on 27 September 2006. Indeed, no reference whatsoever to any such allegations were formally made until the plaintiff's advisors applied to amend the statement of claim on the morning of the first day of the hearing on 28 January 2008. At one stage in his evidence the plaintiff said that he had mentioned the allegations earlier to his own solicitor although he later modified this by saying that he "thought" that he had told his lawyers about the matter. When pressed for an explanation as to why he had not mentioned these allegations the plaintiff said that when he had called

with the defendant for his money before Christmas 2002 the defendant had said something along the lines of:

> "If you have to make a claim you should make a claim."

He said that he thought that, in such circumstances, the defendant would have told his own solicitors what had happened and that, accordingly, he, the plaintiff, did not need to mention the matter. In the circumstances, it seemed to me that this explanation lacked any real credibility. In my view, the most likely sequence of events is that the plaintiff after a consultation with his legal advisors on the Thursday prior to the first day of the trial received professional advice with regard to the issue of liability and decided to make these allegations in order to improve his prospects of success. He then telephoned Mr Armitage that evening and informed him of what he had done. It is not difficult to have sympathy for the plaintiff in the situation in which he finds himself and I have no doubt that he has suffered serious depression with regard to the devastating consequences of his injuries. Such depression may well have been a significant factor in causing him to act as I find that he has done.

[12] The plaintiff has not persuaded me on the balance of probabilities that he should be regarded in some way as an employee or quasi employee of the defendant. In the case of McDonnell v Henry and McDonnell [2005] NICA 17 Kerr LCJ confirmed that no single universally applicable test has been devised to resolve the often vexed question of whether a worker is to be deemed an employee but I am satisfied that the plaintiff could not be regarded as an employee of the defendant whichever of the relevant tests is applied. As he confirmed in his evidence, the plaintiff had been washing windows for the defendant for 4 or 5 years since starting his own business with the help of Fermanagh Training, he was confident and comfortable working at heights, he brought his own equipment and maintained full control over the use of that equipment and the method and timing of his work. The plaintiff's engineer, Mr McBride, agreed in cross-examination that it was reasonable to expect him to be familiar with the appropriate equipment and its limitations after 20 years experience working at heights.

[13] While no particulars of breach have been included in the "Particulars of Breach of Statutory Duty" pleaded in the amended statement of claim, paragraph 2 of that document referred to the Occupiers' Liability Act (Northern Ireland) 1957 and counsel addressed me in relation to breaches of that legislation. Section 2 of the 1957 Act provides as follows:

> "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*) ….
>
> (*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."

[14] In the circumstances of this case I am satisfied that the defendant was entitled to rely upon Section 2(3) (*b*) in respect of the plaintiff's visits to his premises having regard to the plaintiff's self-employed status, his experience as a window cleaner and the degree of control that the plaintiff exercised over the work that he did, how he performed that work and the equipment that he used. This was the first occasion upon which the plaintiff had been asked to clean the free-standing signs. The plaintiff alleged that the request for him to do so was made as a sort of "afterthought" by the defendant on the morning of the accident. That would have been consistent with my impression from the defendant's evidence that his primary concern was with moss and dirt that had accumulated around the letters of the sign on the fascia. However, the defendant denies that he had any conversation with the plaintiff on the day of the accident and maintains that the agreement to do the signs, including the free-standing sign, had been reached during the plaintiff's previous attendance at the premises. For the reasons given above, I rejected the plaintiff's account of his conversations with the defendant and, accordingly, I preferred the evidence of the defendant on this point. Even on the basis of the defendant's version of the agreement I might have been persuaded that the defendant would have been under a duty to ensure that the area around the base of the free-standing sign was sufficiently clear for the safe use of a ladder had I been satisfied that the plaintiff had made his presence known to the defendant when he first attended the premises on the morning of the accident. In his direct evidence the plaintiff stated that he arrived at about 9.00 am but that he had no discussion with the defendant before or after cleaning the fascia sign. That would have been consistent with

his previous practice of arriving unannounced in order to clean the windows. On the other hand, in cross-examination, the plaintiff initially maintained that he had reported to the defendant on the day of the accident informing him that he had come to do the fascia signs. He then modified this observation by stating:

> "I can't recall reporting to Mr Armitage – I may have done."

In the circumstances, bearing in mind the finding that I have already made in relation to the plaintiff's credibility, I am persuaded on the balance of probabilities that the defendant's version is more likely to be accurate. On the basis that he had no reason to believe that the plaintiff was likely to arrive or had arrived on the premises on the morning of the accident I do not consider that the defendant was under any duty to ensure that a sufficiently safe space had been kept clear around the base of the free-standing sign. Furthermore, the plaintiff himself accepted in evidence that, on previous occasions, he had not encountered any difficulty in arranging for cars to be moved had he thought it necessary for the purpose of carrying out his work in safety.

[15] Apart from the Occupiers' Liability Act (Northern Ireland) 1957, the plaintiff also relied upon breaches of a number of Regulations. The Management of Health and Safety at Work Regulations (Northern Ireland) 2000 do not confer a right of action in any civil proceedings insofar as the duty applies for the protection of a third party ie. any person who might be affected by a particular undertaking other than the employer whose undertaking it is and persons in his employment. (Regulations 22). At the date of the plaintiff's accident, 22 September 2002, the Regulations excluded civil liability. The plaintiff relied upon Regulation 3, the duty to make a suitable and sufficient risk assessment, Regulation 10 the duty to provide employees with comprehensible and relevant information relating to risks identified as a result of a risk assessment together with any preventative and protective measures required and Regulation 12, the duty to provide comprehensible information about any risks to health and safety arising out of the conduct of the employer's undertaking. Even in the context of a submission that these Regulations should inform the content of the common law duty owed by the defendant it does not seem to me that they assist the plaintiff. While the defendant might owe a duty to make sure that his premises and the activities carried on therein did not endanger the plaintiff in the work that he was due to carry out, it is my view that such a duty would not arise unless the defendant had some notice that the plaintiff was due to carry out his work on the particular day. In this respect this case differs from that of McDonnell in which the Court of Appeal emphasised at paragraph 42 of their judgment that:

> "The defendant certainly knew that the plaintiff and his father were to use the cement mixer on the day that the accident occurred."

[16] The plaintiff relied upon breaches of Regulations 4 and 10 of the Personal Protective Equipment at Work Regulations (Northern Ireland) 1993 alleging that the defendant failed to provide the plaintiff with suitable personal protective equipment and failed to take all reasonable steps to ensure that any personal protective equipment provided was properly used. As the Court of Appeal confirmed in the McDonnell case the duties under these Regulations only arise in respect of a direct employer of an employee. In any event, the plaintiff did not make a case that he should have been provided with some form of protective equipment but rather based his claim upon the allegation that he should have been furnished with an assistant to foot the ladder. Even if such an assistant had been provided, Mr McBride, the consultant engineer who gave evidence on behalf of the plaintiff, expressed reservations as to whether that would have constituted a safe system and recommended the use of a mobile elevated platform. He agreed that it was reasonable to expect the plaintiff, with the benefit of 20 years experience, to be familiar with the appropriate equipment required and its limitations.

[17] The plaintiff also alleged breaches of Regulations 4, 8 and 20 of the Provision and Use of Work Equipment Regulations (Northern Ireland) 1999 alleging that the defendant failed to ensure that the ladder was suitable for the purpose for which it was used or provided, that the defendant failed to provide adequate information and instructions about the use of the equipment and that there was a failure to stabilise the ladder. These Regulations are imposed upon employers in respect of work equipment provided for use by their employees and upon self-employed persons in respect of work equipment they use but also extend by virtue of Regulation 3(3)(*b*) to a person who has control to any extent of (*i*) work equipment, (*ii*) a person at work who uses or supervises or manages the use of work equipment; or (*iii*) the way in which work equipment is used at work, and to the extent of his control. For the reasons given earlier in this judgment I do not consider that the defendant had control of the equipment used by the plaintiff or of the plaintiff himself in the course of his work or the way in which the plaintiff used his work equipment and accordingly, in my view, these Regulations did not apply. Again, even if they had applied, the defendant had no reason to believe that the plaintiff would attend to carry out the work of cleaning the sign on the day of the accident.

[18] The plaintiff alleged breach of Regulation 13 of the Workplace (Health Safety and Welfare) Regulations (Northern Ireland) 1993 alleging that the defendant failed to take suitable and effective measures to prevent the plaintiff falling a distance that was likely to cause him personal injuries. By virtue of Regulation 4 every employer shall ensure compliance with the

requirements of these Regulations in respect of every workplace that is under his control and by virtue of 4(2)(*c*) relates to matters within that person's control. No specific submissions were directed to this alleged breach of the Regulations which seem to me to relate to the form and structure of the workplace over which the defendant has control rather than to dangers created by the use of equipment by a self-employed person who has control over the use of the equipment. In any event, as I have indicated above, I have reached the conclusion that the defendant was not aware of the presence of the plaintiff on his premises until after the accident had occurred. Unlike Regulation 12(1), which Sheil J held to impose strict liability in McCully v Farrans [2003] NIQB 6, the relevant duties imposed by Regulation 13 are qualified by the phrase "so far as is reasonably practical."

[19] Accordingly, for the reasons set out above, I am not persuaded that the plaintiff has established liability in respect of either negligence or breach of statutory duty and the claim will be dismissed.