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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **05/11/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

RICHARD PROCTOR

Plaintiff;

and

CITY FACILITIES MANAGEMENT LIMITED

Defendant.

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HORNER J

A. INTRODUCTION

[1] The plaintiff is aged 58 years. He is a retail and maintenance technician, colloquially known as a handyman, employed by the defendant at the Asda store in Bangor. On 10 September 2010 while painting from an unsecured ladder positioned in the stairwell of the warehouse at the Bangor store, the plaintiff fell when the ladder apparently slipped. He suffered a nasty fracture to his collarbone and also some soft tissue injuries. He was off work for a period of 11 weeks and suffered financial loss in the agreed sum of £1,269.89. He brings this claim against the defendant seeking compensation for his injuries and his financial loss on the basis that they were caused by the breach of statutory duty and negligence of his employer, the defendant.

[2] Before I begin my judgment, I draw attention to the comments of Schiemann LJ, who gave the leading judgment in the Court of Appeal in England in the case of Customs & Excise Commissioners v A [2003] Fam 55 at paragraphs 81-84 when he said:

> "81. The judgment under appeal runs to some 223 paragraphs …

> 82. A judge's task is not easy. One does often have to spend time absorbing arguments advanced by the parties which in the event turn out not to be central to the decision-making process. Moreover the experienced judge commonly has thoughts about avenues which it might be crucial to explore but which the parties have not themselves examined. It may be his duty to explore these privately in order to satisfy himself whether they are relevant. Having done the intellectual work there is an understandable temptation to which many of us occasionally succumb to record our thoughts for posterity in the judgment or to refrain from shortening a long first draft.
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> 83. However, judges should bear in mind that the primary function of a first instance judgment is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. The longer a judgment is and the more issues with which it deals the greater the likelihood that (i) the losing party, the Court of Appeal and any future readers of the judgment will not be able to identify the crucial matters which swayed the judge; (ii) the judgment will contain something with which the unsuccessful party can legitimately take issue and attempt to launch an appeal; (iii) … (iv) reading the judgment will occupy a considerable amount of the time of legal advisers to other parties in future cases who again will have to sort out the status of the judicial observation in question. All this adds to the cost of obtaining legal advice.
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> 84. Our system of full judgments has many advantages but one must also be conscious of the disadvantages."

I will therefore bear this advice in mind when giving this judgment on issues which can only have a marginal relevance to the outcome of this case and which have been rehearsed at great length in other judgments.

B. THE CASES MADE BY THE RESPECTIVE PARTIES

[3] The plaintiff alleges that the accident was caused by reason of the breach of statutory duty and negligence of the defendant. He relied on the failure of the

defendant to carry out a risk assessment as it is obliged to do under Article 3 of the Management of Health and Safety at Work Regulations (NI) 2000 and breaches of Regulations 4, 5 and 6 of the Work at Height Regulations (NI) 2005. There are also allegations of breaches of Regulation 13 of the Workplace (Health, Safety and Welfare) Regulations (NI) 1993 and of the Construction (Health, Safety and Welfare) Regulations (NI) 1996. In addition the plaintiff alleges that there was a breach by the defendant of its common law duty to provide a safe system of work. In essence the plaintiff's case amounts to an allegation that he was required to carry out a painting job while standing on a ladder on a metal stairwell when this was clearly negligent and in breach of many statutory duties.

[4] The case put forward on behalf of the defendant was that there was no breach by the defendant of its duty to carry out a risk assessment because the duty to carry out that risk assessment had been placed upon the plaintiff himself. It complained that the plaintiff should have been able to complete the job using a paint roller with an extending pole and therefore did not require to use a ladder. In essence the defendant alleged the plaintiff was the author of his own misfortune and that if such a claim was not accepted, then there should be a substantial reduction for contributory negligence.

C. FACTS

[5] The following facts do not appear to be in dispute:

(i) The defendant carries out maintenance work at Asda stores throughout the British Isles. It employs some 11,000 employees.

(ii) The plaintiff commenced work with the defendant in January 2008. He has had no time off work other than with the injuries suffered in this accident and enjoys an admirable disciplinary record.

(iii) The plaintiff worked under the direction of Mr Darren O'Neill who was his line manager.

(iv) Mr O'Neill divided his time between the Asda stores in Bangor and Downpatrick. One week he would spend 3 days in Bangor and 2 days in Downpatrick. The next week he would spend 3 days in Downpatrick and 2 days in Bangor.

(v) Both men had attended a health and safety induction course at Glasgow where the headquarters of the defendant is. This lasted a period of some 3-4 days. They were provided with various health and safety documents.

(vi) The plaintiff was an experienced and skilled manual worker. He had had plenty of experience in using ladders from his time as a fitter with James Mackie & Sons.

(vii) Mr O'Neill would from time to time, when he considered it necessary, obtain from Head Office in Glasgow risk assessments for jobs he intended to have carried out at either the Bangor or Downpatrick stores. He produced two examples of risk assessments on the second day of the hearing neither of which related to the Bangor store. The first dealt with the job of repairing the car park wall at Kilkeel and the second related to painting columns in the forecourt at Downpatrick. Significantly this risk assessment contained the following advice for working at height:

> "The work should be carried out from ground level with the use of long handled rollers. If a ladder is required for short duration work then it should be suitable (sic) secured and footed to ensure it's (sic) stability."

Sound advice, which if given and followed in this case, would have ensured that the plaintiff did not fall and sustain injuries when painting the warehouse at Bangor.

(viii) Mr O'Neill does not seem to have produced any risk assessments which he had reduced to writing. Indeed he said expressly he would avoid paperwork if at all possible. His precise words were:

> "I am not a paper man."

(ix) The unsecured ladder on a stairwell which was not closed to pedestrian traffic, was a danger not just to the person on the ladder, the plaintiff, but to the passers-by on the stairwell. Mr McIlveen, an employee of Asda, understandably remarked to the plaintiff of the risks he was taking in carrying out his painting job from the unsecured ladder shortly before the plaintiff fell.

(x) The ladder could not be secured at its upper end or lower end. The only way of preventing it slipping was for someone to foot it. There were no employees of the defendant available at the time to hold it. There were Asda employees present in the vicinity but they were only able to commit for short periods of time because of other duties.

(xi) The ladder slipped and the plaintiff fell because the ladder was unsecured.

(xii) It would have been much safer for the plaintiff to have used a platform or a podium. However there were none immediately available. In any event to have used such a device would have resulted in the stairway being closed to pedestrian traffic and would have disrupted work in the Asda warehouse.

[6] There were a number of matters in dispute. In part this was due to the different personalities of the plaintiff and Mr O'Neill and the distinct and different approach each took to life. Both struck me as being hardworking, decent men, anxious to do the very best for the defendant, their employer. However the plaintiff was a man who liked to master the small detail, a person who was punctilious in his approach to life in general and work in particular. Mr O'Neill, on the other hand, appeared to favour the "broad brush" approach and did not care greatly if the "i's" were dotted or the "t's" crossed, as long as the job was done. I did not find either of them to be untruthful or evasive. Both did their best to recount events that had taken place 2 years ago but both were looking at what had happened with a certain degree of self-interest.

[7] There was a suggestion from the defendant that the plaintiff did not need to climb a ladder and could have done the job while standing on the ground by making use of the extendable pole. Mr Spence, counsel for the defendant, said that this was how Mr O'Neill had finished the job after the plaintiff was injured. I can well understand that Mr O'Neill might have been content with such an approach. The photographs produced by the plaintiff's engineer showed a girder which had to be painted. The upper surface of the girder would have necessarily gone unnoticed to those on the warehouse floor. But the plaintiff was never going to be content to paint only some of the surfaces even if one of those surfaces could not be seen in normal circumstances. Significantly, Mr Spence did not put it to Mr Hamilton, the engineer who gave evidence on behalf of the plaintiff, that the job could have been carried out perfectly well from floor level using an extendable pole. I conclude that the plaintiff was perfectly reasonable in seeking to paint the upper surface of the girder shown in the photographs and that this accorded with his instructions. In order for him to achieve the necessary access to paint the upper surface of the girder, he had to work from a raised height on the stairwell.

[8] There was no evidence led by the defendant that there was a working platform or a podium from which the plaintiff could have carried out the task of painting all of the girder. His only option was to use a ladder. However, in so far as the plaintiff suggested, and his evidence was somewhat inconsistent on this issue, I do not accept that he had to work from a ladder for 2 hours at a stretch in order to paint the girder. The painting of the girder from the stairwell could have been accomplished in a short burst. However, realistically he would have required someone to foot the ladder over a prolonged period of time as he painted the entire length of the warehouse.

[9] This brings me to the issue as to whether the plaintiff raised the issue of working from a ladder on the stairwell or at all with Mr O'Neill on the Wednesday before the accident occurred. I have reviewed all the evidence. I find that the plaintiff did tell Mr O'Neill on the Wednesday before he commenced work that it would be difficult to carry out the job from the ground. On the balance of probabilities, I find that Mr O'Neill reacted somewhat dismissively. However, I do not find that the plaintiff specifically raised the issue of a ladder with Mr O'Neill or that Mr O'Neill laughed at the plaintiff's request for assistance so that he could use a ladder. It was in the plaintiff's interest to make such a case because it helped him answer Mr Spence's complaint as to why he did not ring Mr O'Neill and ask for instructions as to how to complete the job when he was unable to secure the ladder in the stairwell. It also helped explain why the plaintiff did not wait until Mr O'Neill visited the premises the next day or on the following Monday before commencing the painting of the girder so that Mr O'Neill, if required, could help foot the ladder. It was common case that the plaintiff could have contacted Mr O'Neill by mobile phone. If the plaintiff had complained about having to work from a ladder in the stairwell or even if he had only raised the issue of having to work from a ladder, and Mr O'Neill had laughed at that suggestion, then I would have expected the following to have occurred following the fall:

(i) The plaintiff would have raised this issue specifically in his pleadings through his legal team. There was no such pleading to this effect.

(ii) The conversation with Mr O'Neill would have been raised by the plaintiff in his evidence-in-chief. This did not occur and arose in cross-examination. (Although to be fair to the plaintiff, Mr McCollum QC on behalf of the plaintiff said that he had meant to raise it earlier but that it had slipped his mind. This in itself gives rise to possible arguments about waiver of privilege which it is unnecessary to explore in this judgment.)

(iii) The plaintiff would most certainly have complained to Mr O'Neill that he had suffered injuries as a direct consequence of Mr O'Neill's thoughtlessness. I gained the distinct impression that the plaintiff and Mr O'Neill enjoyed an uneasy relationship and that the plaintiff would have had no hesitation in complaining to Mr O'Neill if he felt it was appropriate to do so.

[10] Mr Spence on behalf of the defendant boldly claimed that the plaintiff had been adequately trained to carry out a risk assessment. Accordingly the only person to blame for such an assessment not having been carried out in this case is the plaintiff himself. I reject outright such a suggestion. Attending a 3-4 day induction course in January 2008, receiving various documents and being told to watch out for hazards, does not make an employee fit to carry out a risk assessment in respect of

such a task as painting a warehouse. Nor, incidentally, did it make Mr O'Neill fit to carry out such a risk assessment either. I have no doubt that if a risk assessment had to be carried out for such a task, Mr O'Neill should have obtained such an assessment from Glasgow Head Office. It was therefore no surprise on the second day when Mr O'Neill produced a risk assessment and method statement relating to painting columns on the forecourt at the Downpatrick store that it had been prepared in Glasgow Head Office. It is difficult to comprehend why a risk assessment should be carried out for painting columns in the forecourt of the Downpatrick store but that no risk assessment was required to paint the inside of the warehouse at Bangor.

[11] Finally the balance of the evidence suggests that the plaintiff was under no time constraints. He did not have to carry out the work by any particular date. In those circumstances it would have been open to him to wait until Friday, the next day, before he carried out work from a ladder so that Mr O'Neill was there to foot and secure that ladder. The plaintiff made a decision not to wait but to press on with the painting, and in particular, the painting which required the use of a ladder. While his industry was commendable, it was, in the circumstances, rather foolhardy.

D. LEGAL CONSIDERATIONS

[12] In Leanne Smith as Personal Representative and Administratrix of the Estate of David Joseph McLoughlin (Deceased) v Rodney Wilgar t/a Wilgar Contracts [2011] NIQB 67 Gillen J considered the ambit of Regulation 3 of the Management of Health and Safety at Work Regulations (NI) 2000 (hereinafter called the "2000 Regulations") at paragraphs 11-15. I adopt his comments and would add the following.

[13] The courts after due consideration now give much more weight to risk assessments being carried out than when Staughton LJ said in Hawkes v Southwark Plc (Unreported Feb 20, 1998) that the need for an employer to carry out a risk assessment was "merely an exhortation with no sanction attached". Smith LJ recently commented in Steven Threlfall v Hull City Council [2011] PIQR p3 at para 35:

> "For the last 20 years or so, it has been generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with his operations so that he can take suitable precautions to avoid injury to his employees. In many circumstances, a statutory duty to conduct such a risk assessment has been imposed. Such a requirement (whether statutory or not) has to a large extent taken the place of the old common

> law requirement that an employer had to consider (and take action against) those risks which could be reasonably foreseen. The modern requirement is that he should take positive thought for the risks arising from his operations. Such an assessment is, as Lord Walker of Gestingthorpe said in Fytche v Wincanton Logistics Plc [2004] UKHL 31 'logically anterior' to the taking of safety precautions. I said something similar, in rather less eloquent language in (58) of Alison v London Underground Ltd [2008] EWCA Civ 71."

[14] The risk assessment will not ignore risks which may be regarded as obvious: see the comments of Richards LJ in Ammah v Kuehne & Nagal Logistics Ltd [2009] EWCA Civ 11 at paragraph 18. He said:

> "Mr Hague submitted that no warning or instruction was even necessary. He pointed to Mr Singh's description of the safe working procedure document as *like an idiot's guide* and submitted that the risk associated with standing on boxes was a perfectly obvious and ordinary one. I cannot accept that submission. That an employer may be under a duty to warn against even an obvious risk is supported by authority. For example, it was held in General Cleaning Contractors Ltd v Christmas [1953] AC 180 that, in leaving it to individual workmen to take precautions against an obvious danger, the employers had failed to discharge their duty to provide a reasonably safe system of work."

He then went on to set out at length what Lord Oaksey had said at pages 189-190. In particular, Lord Oaksey said:

> "It is, I think, well known to employers, and there is evidence in this case that it was well-known to the appellants, that their workpeople are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands an employer should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves."

[15] Accordingly the risk assessment will take into account the fact that employees can be inattentive and careless. In Robb v Salamis M & I Ltd [2006] UKHL 56 Lord Hope said at paragraph 32:

> "For the reasons that I mentioned earlier, account must be taken of the risk of mishandling by the careless or inattentive worker as well as by the skilled worker who follows instructions to the letter conscientiously every time and strives never to do anything wrong. The solution to the problem that these passages raise is to be found in the defence of contributory negligence."

[16] The obligation to carry out a risk assessment is a non-delegable duty. In Uren v Corporate Leisure (UK) Ltd & Ministry of Defence [2011] EWCA Civ 66 Smith LJ said at paragraph 71:

> "It is trite law that the common law duty of an employer to an employee cannot be delegated: see Wilson's and Clyde's Coal Co v English [1938] AC 57. It seems to me the duty to undertake a risk assessment is so closely related to the common law duties of the employer that it would be remarkable if the duty to undertake a risk assessment were delegable and yet the general responsible for safety were not. In my view the judge was clearly right to hold that the risk assessment duty is non-delegable."

Aikens LJ agreed that both defendants were "under a non-delegable duty to Mr Uren and other participants in the game to take reasonable care to ensure that they were not exposed to an unacceptable risk of injury …"

[17] The non-delegable obligation is to carry out a risk assessment which is "suitable and sufficient". If an employer then fails to do so he is in breach of his obligation: see paragraph 31 of Smith LJ's judgment in Uren. This will require the assessment to be carried out with a necessary degree of expertise to ensure it is of the requisite standard, namely "suitable and sufficient".

[18] Failure to carry out a suitable and sufficient risk assessment can never be a direct cause of the injury. As Smith LJ said at paragraph 39 of Uren:

> "It is obvious that the failure to carry out a proper assessment can never be the direct cause of an injury.

> There will, however, be some cases in which it can be shown that, on the facts, the failure to carry out a risk assessment has been indirectly causative of the injury. Where that is shown, liability will follow. Such a failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury. A decision of that kind will necessitate hypothetical consideration of what would have happened if there had been a proper assessment."

A good example of just such a case when the failure to carry out a risk assessment was found not to be causative is Doyle v ESB [2008] IEHC 88. In that case Quirke J found:

> "However, no evidence was adduced in these proceedings which would support the contention that if the defendant had carried out a risk assessment on the plaintiff's job between 1991 and 1996, the risk of his sustaining an injury of the type which he appears to have sustained, would have been apparent to the (presumably expert) assessor."

[19] In the Leanne Smith case Gillen J also considered at paragraphs 16-22 the effect, inter alia, of Regulations 5 and 6 of the Work at Height Regulations (NI) 2005. Again, there is nothing to be gained by me rehearsing what is being so comprehensively and clearly set out in that judgment save to point out that the 2005 Regulations set up a hierarchy of controls. These are:

(a) Firstly, to avoid work at heights where possible;

(b) Then to prevent falls from heights; and failing that

(c) To reduce the consequences of a fall.

Where work at height is necessary the employer has to justify whether a ladder or stepladder is the most suitable access equipment compared to other access equipment options. This is done by carrying out a risk assessment. It is interesting to note that under Regulation 8 (which was not pleaded) an employer has to ensure that when a ladder is used Schedule 7 is complied with. Schedule 7 requires, inter alia, that a ladder can only be used if a risk assessment under Regulation 3 of the 2000 Regulations has been carried out and it has been demonstrated that:

> "…the use of more suitable work equipment is not justified because of the low risk and –
>
> (a) the short duration of use; or
> (b) existing features on site which he cannot alter."

It goes on to say that when a portable ladder is used it "shall be prevented from slipping during use".

[20] The plaintiff has also pleaded breaches of the Construction (Health, Safety and Welfare) Regulations 1996 and the Workplace (Health, Safety and Welfare) Regulations (NI) 1993. I do not consider that breaches of these Regulations add anything to the breaches which have been specifically pleaded in the amended Statement of Claim in respect of the 2000 Regulations and the 2005 Regulations. I do not consider it necessary in those circumstances to deal with them.

[21] Of course it is possible for an employer to escape a breach of statutory duty in certain well defined circumstances. In Boyle v Kodak Ltd (1969) 2 ALL ER 439:

> "The appellant sustained injury when he fell off a ladder while engaged in painting the outside of a large oil storage tank which was some 30 feet high. Other means of access had been used for the lower parts of the cylindrical wall, but the upper part had to be painted by a man standing on a ladder the top of which rested on a rail around the roof of the tank. For safety it was necessary to lash the top of the ladder to this rail to prevent it slipping sideways, and the accident occurred while the appellant was going up the ladder in order to lash it. For some reason never discovered the ladder slipped when he was about 20 feet up and he fell with the ladder."

Lord Reid said at page 441:

> "In my opinion, these and other cases show that, once the plaintiff has established that there was a breach of an enactment which made the employer absolutely liable, and that that breach caused the accident, he need do no more. But it is then open to the employer to set up a defence that in fact he was not in any way in fault but that the plaintiff employee was alone to blame. This does not mean that employer must need evidence, he may be able to prove this from the evidence of the plaintiff, but I do

not think that I went too far in Ross v Associated Portland Cement Manufacturers Ltd (1964) 2 ALL ER 452 in saying that he:

> ***cannot complain if in those circumstances the most favourable inferences are drawn from the appellant's evidence of which it is reasonably capable*."

Munkman on Employers' Liability at Chapter 5, 5.73 states:

> "In some cases an employee who solely brings about breach of his or her employer's statutory duty may be totally precluded from recovering damages. But the courts have been rightly slow to find this to have been the case. In Boyle v Kodak Ltd the House of Lords held that to escape the breach of statutory duty, the defendant had to establish the claimant was wholly to blame or the defendant had done all that was reasonable to ensure compliance. Boyle is authority for the high standard required to shift the statutory duty from the defendant to the claimant."

[22] Finally, the court has to consider what the proper principles are when considering the defence of contributory negligence. In Hutchinson v London and North Eastern Railway Co (1942) 1 KB 481 at 488 Goddard LJ said:

> "It is only too common to find in cases where the plaintiff alleges that a defendant employer has been guilty of a breach of statutory duty that a plea of contributory negligence has been set up. In such a case I always direct myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged was the very thing which the statutory duty of the employer was designed to prevent."

[23] The Law Reform (Miscellaneous Provisions) Act (NI) 1948 brought into law the defence of contributory negligence as a partial bar to recovery of the full amount of any award of damages. Previously, contributory negligence on the part of a plaintiff at common law had given to the defendant a complete defence to a plaintiff's claim for compensation.
Section 2(1) stated:

> "Where any person suffers damage as a result partly of his own fault and partly of the fault of another person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as a court thinks just and equitable having regard to the claimant's share of the responsibility for the damage … :"

[24] In Reeves v Commissioner of Police of the Metropolis (2000) 1 AC 368-371 Lord Hoffman pointed out that **the question to be determined is the relative responsibility of the two parties**, not degrees of carelessness. That question has to take into account the policy behind the rule by which liability is imposed. Regulations are designed, at least in part, to protect the employee from the consequences of his or her own negligence. In order to establish contributory negligence a defendant must show on the balance of probabilities that:

> "(i) the plaintiff was at fault;
>
> (ii) the fault was causative of the injury suffered; and
>
> (iii) it would be just and equitable for his or her damages to be reduced."

[25] It is clear that inattention or inadvertence does not form the basis for a finding **(agreed)**of contributory negligence on the part of an employee who has been injured as a result of the breach by their employers of an absolute statutory duty: eg see McGowan v W and J R Watson Ltd (2006) CSIH 62.

Again, it is important to remember the advice of Lord Neuberger (which is all too often ignored) in Corr v IVC Vehicles Ltd (2008) UKHL 13 paragraphs 21 and 22 when he said that where a defendant is tortiously liable, in the absence of special factors, the degree of contributory negligence that might be attributable to a claimant might be up to 50 per cent but not above.

E. LIABILITY

[26] The answer of the defendant to the undisputed fact that no risk assessment had been carried out, whether written or oral, was that the responsibility for carrying out that risk assessment lay with the plaintiff. This bold assertion made by Mr Spence for the defendant would, if correct, have the capacity to subvert much of the European Framework Directive (89/391/EEC) which, in part, is captured by Schedule 1 of the 2000 Regulations. Anyone charged by an employer with carrying

out a risk assessment will need to have the requisite expertise and experience to ensure that the assessment is "suitable and sufficient". There is no way that it is possible to conclude as per Boyle v Kodak that the plaintiff was "alone to blame" for no risk assessment being carried out. I also conclude that if a risk assessment had been done, it would only certainly have concluded that if a podium, that is a transferrable working platform, could not be used, then a ladder was only to be used for short periods and only if it was "secure and footed to ensure its stability". I am also satisfied given the personality of the plaintiff that if such a risk assessment was made available to him, then he would have followed its guidance to the letter.

[27] I also conclude that there were breaches of regulations 4-6 of the 2005 Regulations. They were, inter alia, failures to:

(a) properly plan work and carry out a risk assessment; and

(b) to take suitable and sufficient measures to prevent the plaintiff from falling by either supplying a podium or other mobile working platform to work from in the stairwell or at the very least making it clear that he could only work from a ladder for short periods if the ladder was properly secured and footed.

[28] Furthermore, I might conclude that there was also a breach of the defendant's common law obligation to provide a safe system of work. Given that the undisputed evidence was that there are 80 fatalities per year and 5,660 major injuries per year from falls at work, it follows that a safe system has to be set up and such a system must be enforced. At a minimum such a system requires all ladders to be secured and footed where there is risk of a workman falling in circumstances where he could suffer significant injuries. When one weighs in the balance the serious risks arising from employees using unsecured ladders against the ease with which measures could be taken to avoid them, the scales come down very heavily in favour of making sure that workmen only use ladders when they are secured and footed.

[29] The plaintiff knew what he was doing was dangerous. He admitted this initially in his evidence. He knew that there was a risk of the ladder falling although he did try and resile from this position during the course of his evidence. This is not a momentary inadvertence or inattention on his part. However, in measuring the relevant responsibility of the parties, I consider that the defendant bears the preponderance of responsibility. It was his non-delegable duty to provide a safe system of work and it was his statutory duty to carry out a risk assessment. I consider that on the facts of this case an apportionment of two thirds responsibility on the part of the defendant and one third on the part of the plaintiff is fair and measures the respective responsibilities of the parties.

F. DAMAGES

[30] The plaintiff suffered a comminuted fracture of the mid clavical, a blow to his head rendering him unconscious and giving him headaches for a period of time, bruising to his chest wall and bruising to his chin. He was given co-codamol, an analgesic, a master sling and referred to the fracture clinic. The fracture of the clavical healed with overlap leaving a bump which causes some cosmetic upset according to the plaintiff. He was off work until November 2010. He has received some physiotherapy. He has been able to continue on at work without taking any further time off. He does complain of difficulty sleeping, of playing with his grandchildren and more particularly when fly fishing. He says that as he is unable to cast, he is confined to coarse fishing. He struck me as being of a stoical disposition. This is confirmed by the fact that he has taken no further time off work. None of the medical experts who examined him considered that he overstated or exaggerated his complaints. Mr Yeates, on behalf of the defendant, was concerned that the fracture may not have united. He considered that the plaintiff was likely to have some persisting complaints in the area which should not get worse or prevent him from continuing with his work. Mr Mawhinney essentially agreed and in his up to date report stated:

> "On the balance of probabilities I believe his symptoms are reasonable and Mr Yeates is in agreement with me in respect of this. The symptoms are unlikely to change."

[31] I remind myself of the two central principles to be followed in awarding damages. Firstly, the plaintiff must be compensated in full for the losses he has suffered: eg see Pickett v BREL (1980) AC 136. Secondly, as Lord Blackburn said in Livingstone v Raywards Coal Company (1879-80)LR 5 App Cas 25 and 39 compensation should be "that sum of money which will put the party who has been injured in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation." The Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (3rd Edition) are just that, guidelines. They were introduced with the laudable aim of achieving, inter alia, a greater conformity of awards in this jurisdiction. However, they do not take into account, for example, a loss of amenity peculiar to a particular claimant. In this case I was especially impressed by the loss of amenity the plaintiff had suffered. He is no longer being able to continue his hobby of fly fishing. I conclude that general damages for pain and suffering in respect of the plaintiff's fracture are £20,000. General damages in respect of pain and suffering and loss amenity for his other injuries are £5,000. In respect of the plaintiff's loss of amenity in being unable to continue his hobby of fly fishing, I assess this at £10,000. In making such an assessment of general damages my initial concern was that I may have failed to follow Lord Blackburn's advice. However, standing back and looking at the total award of £35,000 for general damages, I consider that it does represent

reasonable compensation for the pain and suffering and loss of amenity suffered by the plaintiff. In addition to general damages I also award the plaintiff the agreed sum of £1,269.89 for financial loss.

G. CONCLUSION

[32] I award the plaintiff £35,000 general damages and £1,269.89 special damage caused by reason of the breach of statutory duty and the negligence of the defendant, his employer. General damages will attract interest at 2% from the date of the issue of the writ of summons. The financial loss will bear interest at 6% from the date of injury. The award has then to be discounted by one third to take into account the plaintiff's contributory negligence. I will hear the parties on the issue of costs, if necessary.