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Judgment: approved by the Court for handing down | *Delivered:* **03/05/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

BLAINE VINCENT ADAM QUINN

Plaintiff

and

PATRICK KEENAN

Defendant

GILLEN J

Cause of Action

[1] The plaintiff claims damages for personal injuries, loss and damage allegedly sustained by him on the 2nd of June 2006 when he had lifted down a mechanical vibrating plate (known in this trial as a "whacker" plate) from the rear of a Ford transit van. The plaintiff alleges negligence and breach of Regulation 4 of the Manual Handling Operations Regulations (NI) 1992, Regulation 4 of the Provision and Use of Work Equipment Regulations (NI) 1999 and Regulation 3 of the Management of Health and Safety at Work Regulations (NI) 2000. As a result of which he sustained a mid-thoracic muscle strain.

The Plainttiff's Case

[2] The plaintiff was employed by the defendant, Road Contractors, as a roller driver from in and around January 2004. On the 2nd of June 2006 he was a member of a tarmac laying squad working at Fivemiletown. His foreman was Damien Ward. In addition there would have been a tar spreader, lorry driver and some labourers on the site.

[3] It was the plaintiff's contention that the whacker plate was used to give access to small tight areas. The whacker had been brought to the site in a Ford transit van. On the day in question, he required the whacker and proceeded to lift it out of the van himself. It is common case that this plate weighed in excess of 150 pounds (68kg) and was manifestly excessive for one man working on his own. I have no doubt that it would have been foreseeable to the defendants that lifting the whacker

plate out of the van by means of one man was liable to cause that person injury. Removing the whacker from the van should have been carried out either by using a plank or other type of purpose made skid or, more likely, by him obtaining assistance from other workers. It was the plaintiff's contention that whilst two men would have lifted the whacker into the van, most of the time it was taken out by one person and that he was expected to do this on his own. If someone was nearby, e.g. refuelling a dumper then he would ask for assistance but otherwise he regularly did it by himself. People were dispersed over the site and that he would have been laughed at if he had asked for assistance. He asserted that in his job you simply got on with what had to be done.

[4] Mr Quinn was adamant that the accident had occurred on the 2nd of June 2006 at a site at Fivemiletown. He readily accepted that in the report of Dr McAuley (his GP who was called in evidence) it was recorded that when he attended on the 5th of June 2006 with a complaint of low back pain, it was noted that this had been "ongoing for three weeks" which would be at odds with your date of onset of 2nd June 2006. I was satisfied that that this had been the result of a misunderstanding between Dr McAuley and the plaintiff and I was convinced that the accident had happened three days and not three weeks before he attended Dr McAuley.

[5] It was the plaintiff's evidence that he had contacted Chris Diamond, a civil engineer with the defendant, who works in the office. The plaintiff alleged that he telephoned him from his mother's car, informed him that he had hurt his back and Mr Diamond had told him that this was "ok". Whilst Mr Diamond gave evidence to the effect that he had no recollection of any such call, I did note that in a letter of 12 October 2006 written by Blaine Quinn (although drafted by his solicitor) to Patrick Keenan, he had made this very point i.e. the fact that the circumstances of the accident were reported to Mr Chris Diamond on Monday 5th of June 2006 and this was not challenged in any replying correspondence. I was of the view that the probabilities are that he did make such a call and had spoken to Mr Diamond. If he was manufacturing this evidence, I would have thought it more likely that he would have falsely asserted that he had told Mr Keenan or his foreman (although he did think that he may have done this too). Having watched the plaintiff carefully I do not think that he was sufficiently crafty to have manufactured a conversation with Chris Diamond when he was not the obvious person to whom such a complaint would be forwarded.

Findings that I have made in the course of this hearing

[6] The issue of liability I heard from the plaintiff and his engineer, David McKeown. Engineering evidence played very little part in this case since it was accepted by both parties that the weight of the whacker precluded one man safely lifting it. Mr McKeown did give evidence however that there had been a dispute at his inspection between the plaintiff and Mr Keenan as to whether or not the vehicle that was inspected was the vehicle present on the day of the accident. Mr Quinn was adamant that the vehicle was different from that of the vehicle which he had

used that day. Mr McKeown described the atmosphere as "ugly" and clearly Mr Keenan took a different view. I am satisfied that Mr Quinn was right in this regard and that Mr Keenan's protestations to the contrary were incorrect. This was evidenced by virtue of the fact that the number plate on the vehicle in question had not been issued until July 2008 and therefore it had to be a different vehicle. As I will later mention in my evidence, Mr Keenan's adamant assertions to the contrary underline my view that he was a man not easily given to accepting views which he had formed himself.

[7] On behalf of the defendant I heard evidence from Mr Keenan, the site engineer and essentially the boss of the operation, Mr Ward, the foreman at the time of the accident, Mr Diamond, the civil engineer with the defendant who co-ordinated the contracts and finally Charles Hutchinson, a distinguished Health and Safety consultant and civil engineer.

[8] Having heard these witnesses, and without labouring this judgment by rehearsing in detail each and every detail of the evidence, I formed the following views.

[9] I was satisfied that Mr Hutchinson had conducted a Health and Safety seminar for Keenan employees, including the plaintiff, on the 25th of June 2005 for the purposes of awarding a CITB certificate. The plaintiff had successfully completed a one day Health and Safety course on this date which included manual handling. I accept Mr Hutchinson's evidence that he had also explained the need for the reporting of accidents as soon as possible when these accidents occur.

[10] So far as the manual handling module was concerned on that date, I am satisfied that inter alia, Mr Quinn was informed by Mr Hutchinson that weights above 25 kilograms were too heavy to be lifted. He was also given advice on proper lifting techniques, the need to use mechanical aids and where this was not available to get help. I am satisfied that he was therefore in possession of a CSR card qualification, albeit this would have been sent to his employer and not to him. In so far as Mr Quinn gave evidence that he could not recall this course, I consider that this may well be because of the passage of time that has now passed but I have no doubt that it should and ought to have been present to his mind in June 2006.

[11] I also note that Mr Quinn had a hobby of attending a gymnasium where he lifted weights regularly and should have been aware also of proper techniques for lifting heavy weights. In the course given by Mr Hutchinson, he was told to assess weights before lifting them e.g. by kicking or moving the weight.

[12] I am also satisfied that Mr Keenan did conscientiously carry out risk assessments for the various jobs that were to be performed and that, as evidenced by a number of road surfacing risk assessment forms before me, he did explain in general terms to employees, including the plaintiff, the nature of that risk assessment.

[13] I was somewhat less impressed by Mr Keenan's assertion that he would have gone into detail on each and every occasion with each and every employee about the full details of the manual handling aspects of the job. The strength of his assertion to this effect was somewhat diluted by the fact that he had been equally adamant that the vehicle in question had been the same as that on the day of the accident when Mr McKeown was present. I formed the impression that Mr Keenan was a very confident and assertive person who might be prone to over stating his case from time to time. I noted that the road servicing risk assessment of the Fivemiletown job, contained a reference to Blaine Quinn, the plaintiff, on 2nd June 2006 but, unlike all the other entries, did not contain a signature by him. This assessment risk had apparently been given by Mr Cony McPeake and the absence of that signature persuaded me that there was at least a modicum of truth in the assertion by the plaintiff that these instructions about the risk assessment were perfunctory at times and at least on occasions little more was done than asking the plaintiff to sign that they had been given without him actually being told the specific details. I watched the plaintiff carefully during this evidence and I was convinced that he was telling me the truth about this aspect.

[14] Mr Keenan conceded that on one occasion he had seen a person pulling down the whacker without getting assistance. He said he had banned this after the event because of the damage which it might cause to the whacker plate. In cross-examination he asserted that it was banned because of the damage it might cause to the vehicle. I considered it somewhat significant that he emphasised that the ban was because of the damage it might cause to the equipment and not because of the damage it might cause to the operator. Mr Ward, the foreman, who gave evidence before me, gave evidence that he had never seen anyone lift the whacker on his own from the vehicle. Initially, he said that he was aware that "some people" had done this although he later corrected it to assert that he meant only one person had been doing this. He said this mistake was simply "word of mouth" error. I thought that this may well have some significance in light of the plaintiff's assertion that it was regularly done by various operatives including himself. Once again Mr Ward took the same line as Mr Keenan that the danger was that the machine would be damaged and omitted to make the assertion, which I think ought to have been made, namely that the real danger here was of injury to the operative.

[15] Mr Ward accepted that the men were never instructed specifically to help each other out and to make themselves available. Rather the emphasis, according to him, was that it was common sense that men ought to know to obtain assistance when this task was being carried out.

Conclusions and Liability

[16] It is trite law to state that an employer is vicariously liable for its own employees and others under its control. In McDermid v Nash Dredging and Reclamation Co Ltd (1987) AC 906 the House of Lords made it clear that the duty on

an employer is not merely to devise a safe system but to put it into operation and maintain it in operation. In that case a tug captain employed by an associated company, who was in charge of the operation, arranged this system of waiting for a signal before starting the engine, so that the rope could be cast off safely. He failed to wait for the signal and the House of Lords held the employers were liable. The captain was the man in charge on behalf of the employers and had failed to put into operation his own system. His negligence could not be dismissed as the "casual" negligence of an employee for which an employer would not have been responsible. Whilst therefore it is difficult at times to draw a clear line between an employer's failure to enforce the system and an employee's casual departure from it, nonetheless an employer will become liable where a safe system has been regularly breached without proper supervision or monitoring of that system by the employer.

[17] I believe the plaintiff's assertion that this whacker machine was on various occasions dropped down from the van in the manner in which he sustained his injuries. Mr Hutchinson recognised the "macho" culture that can operate particularly in jobs such as this where men are required to be physically fit and strong. It is incumbent on an employer to make sure that that system for safely lifting weights is rigorously enforced, that a culture as described by the plaintiff should be robustly challenged and that men should be told in no uncertain terms that they must give assistance for lifting these weights when assistance is sought by another employee.

[18] I am satisfied in this case that the safe system of obtaining assistance to remove this whacker machine from the back of the vehicle was not rigorously enforced on all occasions. I accept the evidence of the plaintiff as to how this accident occurred and I believe his account of it. I therefore find primary liability against the defendant on this basis.

[19] However, I am equally satisfied that this plaintiff had trained in manual handling tasks, that he ought to have been aware of the need to obtain help and assistance and indeed had obtained help and assistance on other occasions when help was nearby. Whilst therefore the system of work that operated on this occasion was defective, nonetheless I consider that this plaintiff disregarded an obvious danger and that this was not an excusable lapse. I therefore have come to the conclusion that he should be found contributory negligent to the extent of 50 per cent.

[20] I make it clear that in coming to this conclusion that I do not consider that the breach of statutory duty and in particular the breach of the manual handling operations Regulations (Northern Ireland) 1992 or Regulation 3 of the Management of Health and Safety at Work Regulations (NI) 2000 adds anything materially to the negligent aspect in this case.

Quantum

[21] On the quantum aspect of this case I heard evidence from two distinguished orthopaedic consultants namely, Mr Price and Mr Yates.

[22] It was Mr Price's assertion that the plaintiff had sustained a back sprain in this accident which was treated symptomatically with anti-inflamatory medication and the requirement for physiotherapy. As a result of his examination of the plaintiff, the location of the tenderness and his symptoms, Mr Price suspected that the plaintiff had developed something "like Scheurman's Disease" and he recommended in June 2007 (his report being dated the 6th of December 2006) that an x-ray of the thoraco lumbar spine be obtained.

[23] Mr Price's suspicions proved to be correct when a report from Dr Jackson, Radiologist, revealed as follows:

> "There is slight irregularity of the inferior endplates of one of the middle and one of the lower thoracic vertebral bodies in keeping with previous Scheurman's Disease."

[24] This led Mr Price to conclude, as set out in his evidence and as in his report of 14th September 2007 that:

> "It can be argued that the incident precipitated symptomatology in his back and that in the absence of this incident his back could have remained asymptomatic for a few more years with a maximum of five years."

[25] Mr Price accepted in evidence that given that this man was a manual worker, the likelihood of the back remaining asymptomatic was more likely to be at the bottom end of this bracket of time. He felt in these circumstances that the period that the plaintiff had been off work and for which he claimed special damage, namely between 11 August 2006 and 28 May 2007 (namely 41 weeks and amounting to £8,077) was consistent with someone who had suffered from a back sprain in the context of Scheurman's Disease.

[26] Mr Yates on the other hand, considered that the presence of Scheurman's Disease on the x-ray did not suggest that his back was vulnerable to injury or that his ongoing pain related to that condition as in most cases he found this situation to be asymptomatic. He went on to assert:

> "For Scheurman's Disease to be clinically significant requires the presence of back pain during normal growth in teenage years and I am not aware that this had been the case. It is, therefore, not the case that this man would

> have developed similar back pain after a five year timescale had this accident not occurred."

[27] In short Mr Yates concluded that the accident may have caused some muscle pain to his lower thoracic area but that should have settled with diminishing symptoms after about a three month timescale and at the end of the summer 2006 he was probably fit to return to his original occupation.

[28] Whilst both of these distinguished consultants gave their evidence candidly and with professional skill, I favoured Mr Price's conclusions for the following reasons.

[29] First, I am satisfied that on the balance of probabilities Mr Price's suspicions that he had this condition were well founded and are confirmed by the x-ray report. As Mr Yates conceded, there is no necessary correlation between symptoms and radiological findings. The fact that Dr Jackson only found "slight irregularity" of the endplates did not mean that this man's symptoms were not accurately portrayed. I consider it more than a coincidence that this man's ongoing complaints were set in the context of someone who suffered from Scheurman's Disease which Mr Price had confirmed by his own examination, apart altogether from the x-ray reports. In short I consider that Mr Price's diagnosis gave good cause for the plaintiff to make the assertions of continuing pain that he did.

[30] Secondly, Dr McAuley had indicated that this man had been anxious to go back to work and I hold this in his favour. Indeed, he had attended work shortly after the accident but as Dr McAuley said:

> "It was clear that his return to work had been premature as he was having ongoing back pain."

[31] I do not consider therefore that this man was a shirker without a desire to go back to work. On the contrary he had tried and I consider that this was a genuine effort on his part. Dr McAuley continued to give him certificates up until 13 September 2006. Further certificates were not obtained because the benefits were not being paid thereafter.

[32] Thirdly, having watched Mr Quinn give his evidence, I regarded this man as unassuming and whilst not a great historian, nonetheless he was genuine in the evidence that he gave before me.

[33] I have therefore come to the conclusion that his man did have the condition outlined by Mr Price and that pain has been brought on for something in the area of perhaps three years or thereabouts sooner than otherwise would have been the case. I consider his general damages to be £12,500.

[34] I am satisfied that he was entitled to be off work during the period between 11 August 2006 and 28 May 2007 giving special damages of £8,077.

[35] To these figures will be the appropriate interest on general damages and on special damage. If the parties have any difficulty calculating the arithmetic involved here they should return to me. The costs will follow the level of costs appropriate for this award.

Costs

[36] Subsequent to my handing down the draft judgment in this matter to counsel, it was helpfully calculated for me that the award including interest would amount to £12,324.40 made up of

- £6,250 (being 50% of the general damages) at a rate of 2% i.e. £6,250 plus £495 interest giving a total of £6745 general damages
- £4,038.50(being 50% of the special damage) at a rate of 6%pa over 6.36 years amounting to £1,540.90 interest giving a total of £5,579.40 special damage.

[37] Thus in short the judgment is for £10,288.50 plus interest making a total award of £12,324.40.

[38] Section 59 of the Judicature (Northern Ireland) Act 1978 ("the Act") provides, where relevant, as follows:

> "**Award of costs**
> (1) Subject to the provisions of this Act and to rules of court and to the express provisions of any statutory provision, the costs of and incidental to all proceedings in the High Court … shall be in the discretion of the court and the court shall have power to determine by whom and to what extent the costs are to be paid.
>
> (2) Save as otherwise provided by any statutory provision passed after this Act or by rules of court, if damages or other relief awarded could have been obtained in proceedings commenced in the County Court, the plaintiff shall not, except for special cause shown and mentioned in the judgment making the award, recover more costs than would have been recoverable had the same relief been awarded by the County Court."

[39] Order 62 rule 17 of the Rules of the Court of Judicature (Northern Ireland) 1980("the rules"), where relevant, provides as follows:

> "(4) Save as otherwise provided by any statutory provision passed after the Act and save in cases to which

> paragraph (3) applies, if damages or other relief awarded could have been obtained in proceedings commenced in the county court, the plaintiff shall not, except for special cause shown and mentioned in the judgment making the award, recover more costs than would have been recoverable had the same relief been awarded by the county court.
>
> (5) In cases to which paragraph (7)(*I question as to whether this is not an error and should refer to(6))* applies, where the full amount of the claim exceeds the amount which could have been claimed in proceedings brought in the county court, the plaintiff shall, unless the judge otherwise directs, and without prejudice to any direction under paragraph (4), be entitled to recover one half of his costs.
>
> (6) For the purposes of paragraph (5) the full amount of the claim shall be deemed to be the amount quantified by the Court for which judgment could have been entered if the Court had not made any deduction in respect of the claimant's own fault.
>
> (7) Where a plaintiff is entitled to costs on a county court scale only, the Taxing Master shall have the same discretion to allow any item of costs as the judge of the county court would have had if the action had been brought in that court."

[40] Mr Morrow contended that by virtue of the fact that the value of this case on full liability exceeded the County Court jurisdiction, the case could not have been brought in the County Court.It was properly brought in the High Court notwithstanding that the award was within the County Court jurisdiction. Mr Morrow also drew my attention to the fact that it is now a conventional practice in settlements after negotiations for awards of or less than £15,000 to be based on High Court costs with two counsel where senior counsel has been involved.

[41] Alternatively Mr Morrow argued that given that this matter had taken 2½ days to determine and had resulted in a reserved judgment it was a case where I should exercise my discretion to find a special cause and invoke an award of High Court costs.

[42] Mr Spence on behalf of the defendant contended that Order 62 rule 17 clearly indicated that "if damages … *awarded* could have been obtained in proceedings commenced in the County Court", then the costs are confined to those that would be awarded in the County Court. Had the order intended that costs would be governed

by the amount claimed or awarded after a deduction for contributory negligence etc., then the draftsman would have stated that clearly.

[43] Despite their researches neither counsel was able to unearth any direct authority on this point. I have come to the conclusion that the submission of Mr Spence on this matter is correct. Both the terms of Section 59(2) of the 1978 Act (which find an echo in Order 62 rule 17(4)) and the rules make it clear that it is the *award* of damages which is the defining feature of any award of costs absent a special reason. That seems to me to be the plain intention from the legislation. To find otherwise would be to rewrite both the legislation and the rules and would be inconsistent with a purposive construction of the both. This action could have been the subject of a remittal application by the plaintiff to bring the case into the County Court on the grounds that contributory negligence was likely and even if this was too pessimistic an assessment the County Court judge could have awarded the appropriate figure in such a remitted action.

[44] My conclusion in this matter finds support in "Civil Proceedings, The Supreme Court" by Valentine where the author declares at paragraph 17.34:

> "*Half costs: contributory negligence cases*
> **17.34** If the amount quantified by the Court as the full amount of the claim exceeds the County Court limit but the amount awarded is within rule 17(4) by reason only of a deduction for the claimant's own fault, the rule is, unless the judge otherwise directs, that the plaintiff recover one half of High Court costs (Order 62 r17(5)(6)). The judges in March 1993 further decided that the half costs rule for a plaintiff whose award fell within the County Court limit due to contributory negligence was often unjust because half High Court costs would be rather less than full County Court costs. Therefore, when a plaintiff's award of £20,000 is reduced by contributory negligence to a sum within the County Court limit at the time of issue of the writ, he should be awarded half High Court costs or full County Court costs, whichever is the greater. In doing so, the Court will be refusing to give effect to a rule of the Supreme Court and it would be preferable if the rule itself were amended by the Rules Committee."

[45] The question then arises as to whether "for a special cause shown and mentioned in the judgment making the award" I may direct that the plaintiff be awarded full High Court costs. I note at this stage that in Birch v Harland & Wolff [1991] NI 90 the trial Judge failed to state the special cause in his judgment and the Court of Appeal exercised its power to insert in its judgment the special cause.

[46] In Birch's case the Court of Appeal held that the special complexity of Health and Safety legislation could be treated as a special cause in a case where personal injuries had been sustained as a result of debris affecting the plaintiff's eyesight. Four-fifths of the High Court scale was awarded.

[47] Accordingly the complexity or novelty of a legal issue in a case can constitute special cause.

[48] In the present case, I can find no basis for a special cause. The case was comparatively straightforward without complexity and there was no need for me to consider the particulars of breach of statutory duty given the nature of the negligence.

[49] Hence in this case I award half High Court costs or full County Court costs whichever is the greater.